4th Civil No. D051805

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

THE CITY OF SAN DIEGO,
Defendant/Cross-Complainant and Appellants,

v.

SAN DIEGO CITY EMPLOYEE'S RETIREMENT SYSTEM,
Plaintiffs/Cross-Defendants and Respondents;

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION; SAN DIEGO CITY FIREFIGHTERS, LOCAL 145, IAFF, AFL-CIO; LOCAL 127, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; and, CHARLES GABRIEL ABDELNOUR et al.,
Intervenors/Cross-Defendants and Respondents.

Appeal From The Superior Court For San Diego County
Honorable Jeffrey B. Barton, Judge (Case No. GIC 841845)

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION; SAN DIEGO CITY FIREFIGHTERS, LOCAL 145, IAFF, AFL-CIO; LOCAL 127, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; and, CHARLES GABRIEL ABDELNOUR et al.'s

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Intervenors and Respondents SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, AFSCME LOCAL 127, SAN DIEGO CITY FIREFIGHTERS LOCAL 145, and the *ABDELNOUR* PLAINTIFFS GROUP (collectively "Intervenors") file this brief in response to the CITY OF SAN DIEGO's appeal from the Judgment entered on September 17, 2007, dismissing its sixth amended cross-complaint.

I.

INTRODUCTION

No promise is more sacrosanct in a working person's life than a pension promise. It is the employer's "IOU" each payday when a portion of the wages earned are paid and the promise of the remainder upon retirement renewed. Pension promises influence critical decisions more than once in a working person's life: decisions to take a job and stay with it; decisions to decline other opportunities or chase other dreams; decisions on how to save and how much; decisions on whether to retire and when. So inviolate is the pension promise for public employees that, unlike other employment promises, both the State and Federal Constitutions protect it from impairment.

In this case, the City of San Diego comes to this Court in search of a means to break its pension promises made over the past decade. The City wants this pension bail-out to achieve budget relief and to rescue it from its past fiscal policy-making.

So shameless is the City's approach that it seeks to shift blame to others when it *alone* was both architect and cheerleader for the pension funding strategy it now regrets. So bold is the City's approach that it seeks special treatment as a litigant, disparaging the application of statutes of limitation and the doctrine of res judicata to its claims as "hyper-technical." So misguided is the City's approach that, in the pursuit of what it calls "good" government, it seeks (1) to renege on pension promises made to thousands of retirees, beneficiaries, and active employees who the City admits are *innocent* and violated no law; (2) to denounce assurances given, concessions made, and trade-offs induced in the course of collective bargaining over the past decade; and (3) to avoid the consequences of two Judgments entered in class action litigation related to its pension plan.

Undaunted, on appeal, the City protests that each of the trial court's five substantive rulings leading to the dismissal of its claims involved "stark legal error." In support, the City stubbornly regurgitates every argument made, not once but multiple times, before the trial court's final *decisions* were filed. In contrast, the trial court's 63 pages of decision-making offer a thorough, well-reasoned path through a complex set of facts and circumstances spanning a 12-year period. The trial court's unassailable legal analysis led to the correct result which should be upheld.

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II.

STATEMENT OF FACTS

The City appeals from the Judgment entered against it after a trial of special defenses to its fifth amended cross-complaint ("5ACC") and following demurrer to its sixth amended cross-complaint ("6ACC"). The result, for the most part, neither involved nor required a resolution of the City's claims on their factual merits. Nonetheless, in support of its appeal, the City offers an 18-page "Statement of Facts" intended to show that debt limit and conflict-of-interest laws were violated when the San Diego City Employees Retirement System (SDCERS) responded favorably to the City's funding proposals in 1996 and in 2002, known, respectively, as "Manager's Proposal 1" ("MP 1") and "Manager's Proposal 2" ("MP 2").[1] (AOB at 9-27.) Disposition of the case below did not reach, and this appeal does not turn on, proving or disproving that these laws were violated, and the parties accordingly have not developed a full evidentiary record on those issues.

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[1] As the trial court noted in its Statement of Decision: "the terms 'MP 1' and 'MP 2' are capable of different interpretation based on different points in time and context. For example, as used by the parties in this action, the terms refer to both the employee retirement benefit increases by the City and the SDCERS contribution relief. In some contexts, the terms appear to have referred to the SDCERS contribution relief only." (12 CT 3120:27-28, fn. 1.)

The evidence and findings of the trial court which support and explain the legal grounds on which Judgment was entered are as follows:[2]

A. The *City*, Not SDCERS, Created, Lobbied For, And Implemented Both MP 1 And MP 2

In contrast to the City's current description of MP 1 and MP 2 as self-interested schemes to increase retirement benefits by "tampering" with funding methods, the trial court found that the City, not SDCERS, was the architect of the pension funding strategy at issue in the case:

> The evidence was clear that with regard to both MP 1 and MP 2, the City was the moving force in creating, lobbying for and implementing the plan to increase retirement benefits while at the same time reducing contributions to a level below that actuarially required. The plan at each step was authorized by the City through its highest elected and management personnel. In both 1996 and 2002, the then City Managers presented the proposal to couple benefit enhancements with reduced contributions to the City Council and Mayor before raising them with the employee union representatives or SDCERS. (12 CT 3119:25-3120:4.)

B. MP 1

1. The Trial Court's Findings Related to MP 1

The trial court found the following:

By 1996, City employees had gone many years without an increase in retirement benefits. The City was aware that increasing benefits was a high priority for the unions in negotiations with the City. (12 CT 3120:5-7.)

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[2] All facts in this brief are supported by reference to the Clerk's Transcript, abbreviated as: ([volume] CT [page]); the Reporter's Transcript, abbreviated as: ([volume] RT [page]:[line]); the trial exhibits admitted into evidence, abbreviated as (Exh. [number]); and the City's Opening Brief, abbreviated as: (AOB at [page]).

However, fluctuations in the City's actuarial contribution to the pension system from year to year made budgeting the required contribution unpredictable and difficult. The SDCERS Board had rejected the City's proposals to reduce pension contributions in prior years when the proposals did not include benefit improvements. (12 CT 3119:9-16.)

At the same time, the retirement system had experienced several good years of investment returns on its assets, and earnings exceeded the average assumed rate of return of eight percent (8%). (12 CT 3119:16-18.) City Manager Jack McGrory's plan took advantage of these "surplus earnings," using them to offset the increases in actuarial liability created by granting retroactive benefits rather than leave them in the fund to offset future investment performance in bad years. (12 CT 3119:5-8, 19-24.)

Thus, "in May 1996, Mr. McGrory made a presentation to the SDCERS Board outlining Manager's Proposal 1 ("MP 1"). MP 1 presented retirement benefit enhancements which the City was in the process of negotiating with its workers, together with a proposal to reduce the City's contribution to the pension system to a level below the actuarial required rate. (Exh. 56 and 276.6-276.27.)" (12 CT 3120:23-3121:3.) The Unions were kept apprised of this proposal in their contract negotiations. The City's and SDCERS' fiduciary counsel and SDCERS' actuary were consulted about concerns raised at SDCERS over the propriety of allowing funding at the proposed reduced rate and a number of public meetings

ensued. (See, Exh. 57, 82B, 84, 85, 87, 164, and 276.) (12 CT 3121:4-7.) The legal advice obtained, in part, reflected that under the *Claypool* case, the Board could consider benefit improvements and expense to the employer as factors in the total circumstances surrounding the Manager's Proposal. (See, *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 676; Exh. 164.3-164.6.) (12 CT 3121:7-14.)

MP 1 ultimately passed the SDCERS Board on June 21, 1996. (Exh. 276.148.) (12 CT 3121:8-16.) Several of the SDCERS Board Members voting in favor of the proposal were City employees whose retirement benefits were improved by the City's enactment of the new benefits. (12 CT 3121:15-19.)

2. The City Advocated MP 1 As A Fiscally Responsible Solution For A Cash-Strapped General Fund In Light Of SDCERS' "Tremendous Earnings"

At a public meeting of the SDCERS Board on June 21, 1996, City Manager Jack McGrory explained the City's approach and timing this way:

> [T]his is not an attempt to achieve a reduction or holiday in the City's contribution rates, but rather an attempt to responsibly manage financially, the significant increase in the City's contribution rates. From a business perspective . . . this is a wise decision.. . .[T]his proposal . . . would raise the general member benefit levels to market rate. . . . (and) in viewing the window of opportunity which has resulted from the tremendous level of earnings in the System, this is an opportune time to make these changes . . . (Exh. 82B.32.)

At trial, Mr. McGrory described MP 1 as "a fiscally responsible solution to a situation in which we had incredible stress and pressure on our General

Fund, in terms of a lack of revenues. We had the state transfers of money from the City to the state, we had the impact of . . . a prolonged recession on sales tax and property tax." (17 RT 2572:1-15.) The idea, he said, was that contributions to the pension plan would "ramp up over a period of time and achieve a different type of funding in the system . . . a more stable employer contribution described as entry age normal." (*Id.*)

In response to specific questions from SDCERS Board Members about the fate of the pension benefit improvements being proposed if the funding level dropped and triggered larger contributions from the City in the future, McGrory acknowledged, frankly, that if the City Council adopted the benefit improvements identified in the Manager's Proposal, these improvements would remain in effect regardless of how well the funding strategy worked and that, because of the courts' treatment of property rights, it would be almost impossible to unwind benefits once they had been granted. (Exh. 82B.30-82B.31.)

3. MP 1 Depended On Approval Of Outside Experts Who Agreed That A Benefit Increase Was A Necessary Offsetting Advantage To The City's "Rate Stabilization Plan"

MP 1 depended on the approval of outside experts retained by the City and SDCERS, not by employees or their unions. The Tentative Agreements reached in early June 1996 between the City and its four labor unions – the San Diego Municipal Employees Association (MEA), AFSCME Local 127, the San Diego City Firefighters Local 145, and the

San Diego Police Officers Association – contained these express contingencies:

> The City Manager's proposal is being reviewed by outside fiduciary counsel engaged through the City Attorney's Office and has been presented to the CERS Board's fiduciary counsel and actuary for review and advice to the Board. All proposed changes are conditioned upon and subject to final approval by fiduciary counsel, City Council approval, Retirement Board approval, vote of plan participants, and confirmation of cost estimates by the System's actuary. (Exh. 155.6, 155.14, 155.22, and 155.29)[3]

Even after reaching tentative agreements with its four labor unions to extend existing labor contracts in exchange for improvements in compensation, including pension benefits, the City unilaterally *changed* the funding terms associated with the Manager's Proposal on June 7th and again on June 21, 1996, in order to satisfy concerns raised by SDCERS' outside fiduciary counsel. (Exh. 276.93-276.98; 276.160-276.163.)

SDCERS' counsel, Dwight Hamilton, agreed that the City's proposed "Contribution Rate Stabilization Plan" (*i.e.*, the funding component of MP 1) involved a proper use of trust fund reserves totaling $106,700,000 – with $76.7 million being allocated to pay the cost of past service credit for new benefits and another $30 million to defray the anticipated contribution shortfall under the Contribution Rate Stabilization

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[3] The City Attorney's Office actively participated in the meet and confer process between the City and its labor Unions in 1996 and in 2002 – both at the bargaining table *and* in the City's confidential strategic planning sessions *and* in all closed sessions between the City's designated negotiators and the Mayor and City Council (Exh. 125-129, 132, 134-142, 144-146, 148-151, 152-154, 88, 277, 379-380, 324.)

Plan. Since these funds, together with another $10,769,620 in the Earnings Stabilization Reserve, *had not previously been identified as actuarial assets by the Board*, Hamilton advised the City that it was proper "under the criteria set forth in *Claypool*" [*Claypool v. Wilson* (1992) 4 Cal.App.4th 646] to use them as the City was requesting. (Exh. 84.1-2, emphasis added.)[4]

The City's outside fiduciary counsel assured the City that both the original and modified version of the Manager's Proposal presented to the SDCERS Board at its meeting on June 21, 1996, was legal. (Exh. 133, 164, 147.8.)

Following the SDCERS Board's favorable vote on June 21, 1996, SDCERS Board Member John Casey, by memorandum dated July 16, 1996, referencing "Improper Board Function (Negotiating) and Apparent Conflict of Interest," copied to Mr. McGrory, requested a written opinion from SDCERS' outside fiduciary counsel on whether the Board's vote on MP 1 constituted a conflict of interest due to Board Members' participation in the pension plan. (Exh. 1334.)

Consistent with the advice given by the City's outside counsel in approving the legality of MP 1, SDCERS' outside counsel responded in

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[4]Quoting *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863-64, *Claypool* held that a public employee's vested contractual pension rights may be modified prior to retirement only under limited conditions, including the condition that "'changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.' " *Claypool v. Wilson*, *supra*, 4 Cal.App.4th at 661-62.

writing to Mr. Casey's inquiry with assurances that the action of the SDCERS Board was not a conflict of interest, (Exh. 84.4-84.7), and that the Board's approval of the "Contribution Rate Stabilization Plan" set forth in MP 1 was a proper exercise of their fiduciary duties precisely *because new benefits* were being made available as an "offsetting advantage" to any arguable "disadvantage" associated with the funding proposal:

> A trustee's duty of loyalty requires him or her to protect the integrity of the fund so that its actuarial soundness will not be impaired. . . . In discharging that duty, the Board is naturally concerned about the (Contribution Rate Stabilization) Plan's effect on the System. . . ."The saving of public employer money is not an illicit purpose if changes in the pension program are accompanied by comparable new advantages to the employee." *Claypool*, 4 Cal.App.4th at 665 . . .The City Manager's Contribution Rate Stabilization Plan is therefore a modification of the pension system designed to effect economies for the benefit of the City. This modification is accompanied by an increase in benefits and other advantages granted to the beneficiaries and members in Issue No. 2 of the City Manager's Plan. Thus, the modification appears to comply with the modification of vested rights rules of *Betts* and *Claypool*, and is consistent with the duty to minimize employer contributions set forth in Article XVI, § 17(b) of the California Constitution." (Exh. 84.3.)

4. <u>The City Council Exercised Its Exclusive Legislative Power In Enacting the "MP 1" Pension Benefit Improvements</u>

After obtaining approval of the employees and SDCERS Board, the Mayor and Council passed Ordinances implementing the increased benefits. (12 CT 3121:22-24.)[5] In doing so, the City Council exercised its exclusive,

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[5] Establishing the level of pension benefits for City employees is unquestionably a legislative act. "[T]he revocation of legislative action is itself legislative." *Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, 1785. Legislative enactments cannot be invalidated simply because they

non-delegable power under the City Charter, Article III, section 11. (Exh. 1101.) The San Diego Municipal Code was amended by three separate legislative actions to implement the MP 1 benefit improvements: Ordinance O-18383 on February 25, 1997 (Exh. 1105); Ordinance O-18385 on March 4, 1997 (Exh. 238); and, Ordinance O-18392 on March 31, 1997 (Exh. 230). Ordinances O-18383 and O-18392 expressly stated that they had been approved by the City Attorney's Office and by outside fiduciary counsel, tax counsel and plan consultant to the Retirement System. (Exh. 1105.36, 230.5, ¶ 6, and 230.45.)

These legislative actions were followed by the City Council's adoption of Resolution R-288643 on May 13, 1997, approving modifications to, and a one-year extension of, existing MOU's, incorporating the new MP 1 benefits as well as making other changes in wages, terms and conditions of employment (Exh. 1111, 1115, 1119, and 1123) and, on May 27, 1997, by the enactment of Salary Ordinance O-18406 (Exh. 1130), authorizing expenditures during fiscal year 1998 ("FY 98") for salaries and other forms of compensation for all City employees, including the promised items of compensation contained in the negotiated

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may have been motivated by purported illegal or improper considerations. *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 912-13 (salary increases enacted by governing bodies of County and School District in settlement of an illegal public employee strike are valid exercise of legislative power). Whether a governing body acts wisely or unwisely is of no concern of the courts, and a court will not inquire into the question of whether a legislative body made a good or a bad bargain. *In re City and County of San Francisco v. Boyle* (1923) 191 Cal.172, 184-185.

MOU's for represented employees adopted by Resolution R-288643 (Exh. 1111).[6]

C. The City and Its Labor Unions Bargained New MOU's in 1998 Which the Trial Court Found Replaced the Expired MP 1-Related MOU's

The MOU's, which had been renegotiated and extended for one-year in 1997 in connection with MP 1, were set to expire on June 30, 1998. Pursuant to the time-lines established in those MOU's, the parties returned to the bargaining table in the spring of 1998. As evidenced by the proposals exchanged during this bargaining process, *existing* wages and benefits, including the MP 1 benefits, were the "starting point" from which these negotiations proceeded. (Exh. 1294, 1321, 1405, 1406, 1407 and 1408.)

The resulting new agreements were adopted by the City Council on June 29, 1998, by Resolution R-290392, making these new MOU's final and binding between the City and MEA, AFSCME Local 127, Firefighters Local 145, and the San Diego Police Officers' Association for the period July 1, 1998, through June 30, 2001. (Exh. 1112, 1116, 1120, 1124, and 1422.) The following year, on May 18, 1999, the City Council enacted Salary Ordinance O-18649, (Exh. 1132), authorizing expenditures during FY 00 for salaries and other forms of compensation for all City employees,

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[6] Every Resolution adopting an MOU, and every Ordinance amending the SDCERS pension plan, was written and approved by the City Attorney's Office *before* being acted upon by the Mayor and City Council. (Exh. 155, 1105, 238, 230, 1111, 1112, 1424, 1193, 1113, 61, 73, 74, and 107.)

including the promised items of compensation contained in the negotiated MOU's adopted by Resolution R-290392. (Exh. 1112.)

The trial court found that the testimony of "numerous witnesses" established several general rules concerning the negotiations between the City and its employee representatives under the Meyers-Milias-Brown Act ("MMBA"), concluding that these 1998 MOU's were new agreements which replaced the expired 1997 agreements. (12 CT 3120:8-10, 21-22.)

Substantial undisputed evidence supports this finding: MOU negotiations included a wide variety of interrelated issues; each issue was affected by, and considered in light of, what was offered in other areas; both management and the employees used the old expiring MOU as the starting point for the new round of negotiations; and each new MOU was approved by the employees in an election and was then adopted into the San Diego Municipal Code by the Mayor and Council. (12 CT 3120:8-20.)

Moreover, the trial court noted the absence of any evidence that SDCERS as an entity had been involved in any way in the negotiation of these MOU's or any allegation that Government Code section 1090 was violated in the passage of these MOU's. (12 CT 3122:1-6.)

D. The Judgment in the *Corbett* Class Action Created New Pension Benefits for All SDCERS Plan Participants

On July 16, 1998, following the California Supreme Court's decision in *Ventura County Deputy Sheriff's Assn. v. Board of Retirement of Ventura County Employees Retirement Assn.* (1997) 16 Cal.4th 483, the *Corbett*

class action was filed. (Exh. 919 and 920.) The *Corbett* plaintiffs alleged that SDCERS was miscalculating the "final compensation" of retiring City workers by excluding items of compensation (such as uniform allowances, vacation allotments, overtime and other benefits) which the *Ventura County* Court had determined should be included. (12 CT 3122:10-20.)

Because an employee's retirement benefit is calculated by reference to "final compensation," with the employee receiving a percentage of "final compensation" determined by years of service and an age-based "retirement factor" (for example, 2.8% at age 65), the trial court observed that: "Anything which could drive up 'final compensation' increased the benefit and increased the amount the City should contribute into the pension system." (12 CT 3122:22-3123:3.)

The City, responding as real party in interest, answered the *Corbett* Complaint alleging that "retirement benefits have been properly calculated and paid under applicable law and according to agreements and long-standing practices," and filed a cross-complaint asserting that, if certain previously-excluded forms of compensation had to be included when calculating a pension allowance, the plaintiff employees would owe greater contributions to the system than had been deducted from their paychecks. (Exh. 2177.) No party in the *Corbett* case challenged the legality of the benefits enacted in 1997. (Ex. 919, 920, and 2177.)

Outside counsel retained to represent the City and SDCERS jointly, with assistance from the City Attorney's Office, concluded that the City stood to lose $743 million if the *Corbett* plaintiffs prevailed on their claims. Such a loss would result in an increased $75 million annual contribution to SDCERS and would lower the funded ratio of the plan to 68.4%. A proposed settlement alternative was presented to the City Council whereby pension benefits for all plan participants would be increased in exchange for the *Corbett* plaintiffs' forfeiting their claims to include the *Ventura County* items of compensation in the calculation of their "final compensation." The proposed settlement had an estimated cost to the City of only $14.4 million annually. (12 CT 3123:4-27.)[7]

On May 17, 2000, Judgment in the *Corbett* Class Action was entered.[8] (Exh. 930) New MOU's were created with all City unions to document the *Corbett* benefit increases. On July 31, 2000, the City Council adopted Resolution R-293600, (Exh. 1113), approving these new or extended MOU's between the City and MEA, AFSCME Local 127,

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[7]On May 12, 2000, the Hon. Robert E. May of the San Diego County Superior Court presided over a Fairness Hearing in the *Corbett* case. Counsel for the City informed the Court that the funded level for SDCERS was at 93.2%; counsel for all sub-classes represented that "None of the plaintiffs in this case wanted to jeopardize the financial integrity of the retirement system – and this settlement accomplishes that." (Exh. 2176.21:22-23; 2176.22:10-19; 20 RT 3364:16-20.)

[8] The City's Verified Discovery Responses dated 8/25/06 (Ex. 779.58), and dated 10/2/06 (Ex. 1260.63), confirmed that the City is *not* challenging *Corbett* in this case.

Firefighters Local 145, and San Diego Police Officers' Association, each having an expiration date of June 30, 2002. (Exh. 1117, 1121, 1125, and 1423.) Among other changes to wages, benefits, and terms and conditions of employment, these new MOU's also incorporated the *Corbett* pension benefits. (Exh. 1295 and 1296.)

On August 7, 2000, the City Council enacted Ordinance O-18835, implementing all of the terms of the *Corbett* Judgment, including the exclusion of various forms of compensation (addressed in the *Ventura County* decision) from pensionable "final compensation," and the new vested benefits were codified in the San Diego Municipal Code. (Exh. 1193.)

The trial court found that "the testimony confirmed retirement benefits were increased in the *Corbett* settlement," and that by settling the case in this way, the City avoided having to agree to add the *Ventura County* items of compensation to the calculation of final compensation, "only to be faced with new demands to increase the 'retirement factor' in MOU negotiations a year later." (12 CT 3124:1-8.)[9]

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[9]SDCERS participants were similarly informed that settlement of the action would affect and change their vested retirement benefits, both in a Notice of Pendency of Class Action mailed to all SDCERS plan participants, (Exh. 1128.1:27-1128.2:2), and during the Charter-mandated voting process for all plan participants to approve or reject the benefit improvements set forth in the *Corbett* Judgment. The "Benefits Election Report" issued by SDCERS, stated, in pertinent part: "PLEASE VOTE. THE PROPOSED SETTLEMENT INVOLVES CHANGES TO YOUR SDCERS VESTED DEFINED RETIREMENT BENEFITS. . . ." (Exh. 826.1, emphasis in original.)

E. MP 2

1. The 2002 Bargaining Impasse And The City's "Last, Best and Final Offers"

With the MOU's adopted on July 31, 2000, containing the benefits resulting from the *Corbett* settlement, set to expire on June 30, 2002, the City and its four labor unions returned to the bargaining table. At the start of the meet and confer process, the City touted its financial strength and credit ratings, (Exh. 1309.2), and identified $682.6 million of its FY02 Budget devoted to a Capital Improvements Program with the "Ballpark and Redevelopment of East Village" among its "major projects." (Exh. 1309.9.)

The trial court found, that, at the same time, due to lower investment returns in a declining market, "the City again elected to pursue a strategy, as it had done in 1996, of increasing employee retirement benefits while at the same time requesting funding relief from SDCERS. As in 1996, the City Manager received approval of the concept from the Mayor and Council prior to presenting it to the employees and Pension Board." (12 CT 3124:20-3125:1.)[10]

Following weeks of bargaining, the City and its unions were unable to agree on the terms of new MOU's. An impasse was declared and an impasse hearing held before the Mayor and City Council. Thereafter, the

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[10] It is clear in hindsight that the City was both blinded in its fiscal policy-making by the exuberant investment returns in the years which followed the implementation of MP 1, and convinced that its pension funding strategy was both legal and the best solution to its perennial cash-strapped state.

City presented "last, best and final offers" ("LBFO's") to each of its four labor unions on May 13, 2002. (Exh. 272, 274, 311, and 1267) These LBFO's expressly required each Union to accept or reject the *entirety* of the City's offer for a new 3-year MOU *as written*, including a contingency related to the SDCERS Board's willingness to lower the "trigger" in MP 1 from 82.3% to 75%. (See, e.g., Exh. 272.1, 272.2, 272.12; 274.1, 274.2, 274.4, 272.7, and 1267.1, 1267.2, 1267.4, 1267.7.) The "trigger" referred to the funding level at which an automatic increase in the amount of the City's annual contribution to SDCERS would be "triggered." The LBFO's also included various wage and benefit improvements over three years, an improvement in retiree medical benefits, increases in the City-paid "pick-up" of employee pension contributions, and an increase in the retirement calculation factor for all General Members of the City's pension plan from 2.25% at age 55 (the *Corbett* factor) to 2.5% at age 55, with a corresponding new 90% cap on benefits payable in relation to final compensation. (Exh. 272.6 and 274.4.) While the City's LBFO's proposed that the cost of these new pension benefits be split 50/50 by the City and employees on a going-forward basis, the City agreed that the $41.7 million cost associated with past service credit would be amortized and paid by the City from its annual budget.[11] (See e.g., Exh. 272.6.) Three of the City's

[11] Since 1926, the City's Charter had permitted unfunded liabilities in the City's pension plan to be amortized over 30 years. In November 2004, San Diego voters approved Proposition G, amending the City Charter to require shorter amortization periods when new pension benefits are created.

four labor unions, MEA, Local 127 and Local 145, accepted the City's LBFO's; the San Diego Police Officers Association did not. (*See* 12 CT 3125:4-11.)[12]

2. The City's Efforts to Persuade the SDCERS Board to Modify MP 1

The City's evolving proposals for modifying its MP 1 funding agreement with SDCERS were aired during four public sessions of the SDCERS Board: May 29, 2002 (Exh. 947), June 21, 2002 (Exh. 65), July 11, 2002 (Exh. 66 and 1166), and November 15, 2002 (Exh. 742 and 743). The City proposed to lower the 82.3% MP 1 trigger to 75% while at the same time increasing the rate of contribution to the fund by .5% per year over what it had been under MP 1. (12 CT 3125:25-3126:2.)

The trial court found that concerns regarding the propriety of the proposal were raised by a number of SDCERS Board members over "a wide variety of issues including, but not limited to, whether the board members could approve such a proposal while fulfilling fiduciary duties, whether the pension would be adequately funded and the potential for

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(Exh. 1465.)

[12]The trial court found: "The last, best and final offer under the MMBA is essentially the final step in the negotiation process. It constitutes a take it or leave it offer by the public entity to the employees. . . . In each of these last, best and final offers, the City made retirement benefit increases expressly contingent on funding relief from SDCERS. (*See*, Exh. 272.2, ¶ 3, for language similar to that found in all the offers.) The proposal was accepted on these terms by the MEA and Locals 127 and 145." (12 CT 3125:4-11.)

indemnification of board members by the City from potential litigation exposure." (12 CT 3125:15-24; Exh. 65 and 276.179-276.197.)[13]

The trial court found that, "[a]lthough the evidence of the mechanism is not clear, it is apparent that the City was aware prior to the SDCERS meeting of July 11, 2002, that if the efforts to "sell" the 75% trigger reduction failed, an alternative motion would be made by a board member to keep the trigger at 82.3% while allowing the City a multi-year ramp up period to get to the actuarial funding level if the trigger were hit. On July 8, 2002, this proposal was outlined and approved by the City Council in closed session several days before the SDCERS Board meeting. (Exh. 277.)" (12 CT 3126:3-9.) At the July 11 meeting, SDCERS rejected the City's efforts to sell the trigger reduction. SDCERS Board Member Ron Saathoff, the Firefighter's Union President, made an alternative motion to keep the trigger at 82.3% and to allow the multi-year ramp up period, subject to approvals from both the pension's actuary and fiduciary counsel. (12 CT 3126:10-14; Exh. 66.33 and 276.234.)

Following this meeting, City Manager Uberuaga notified the unions "that the City had a deal with its employees and that the action by the Pension Board was within his authority." (12 CT 3126:14-16.)

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[13]The City made it a priority to convince SDCERS to provide funding relief by lowering the MP 1 trigger. The trial court found that City Manager Uberuaga designated Bruce Herring as the point person in presenting the MP 2 plan to the SDCERS Board, and that Herring made several presentations to the Board in June and July of 2002. (12 CT 3125:15-17; Exh. 276.179-276.197.)

Rather than wait for the contingencies contained in the SDCERS Board's tentative vote to be resolved, the Mayor and City Council instead adopted Resolution R-297213 by a unanimous vote on October 21, 2002, making the newly-negotiated 3-year MOU's with its Unions – including the previously contingent new pension benefits – final and binding *without any remaining contingency.*[14] (Exh. 73, 1118, 1122, and 1126; *see* 12 CT 3126:19-23.)

The uncertainties which remained over the City's proposed funding relief, including the opinions to be offered by the Board's outside fiduciary counsel and the system's actuary, as well as the outcome of bargaining with the City over the actual terms of a new funding agreement, were not ultimately resolved until more than three (3) weeks later. On November 15, 2002, the SDCERS Board voted 10 to 2 in favor of the actual MP 2 terms which resulted from negotiations between SDCERS' outside fiduciary counsel and Deputy City Attorney Elmer Heap on behalf of the City. (Exh. 379, 380, 324, 742 and 743.)

On November 18, 2002, the City Council passed an ordinance agreeing to indemnify pension board members in the event they were sued as a result of their duties, (Exh. 108), and on the same day approved the proposed new funding plan with SDCERS. (Exh. 109.) (12 CT 3126:24-

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[14] The City knew that adoption of this Resolution would constitute a binding commitment to improve pension benefits as promised in the MOU's. (See Memorandum from the City Attorney's Office to the City's Labor Relations Manager, Personnel Director and City Auditor, Exh. 293.)

26.) At the public meeting before these actions were taken, SDCERS Board Member Diann Shipione expressed concerns about MP 2 directly to the Mayor and City Council, and memorialized these concerns in a letter of the same date.[15] She expressed herself in the strongest terms – questioning whether a breach of ethics and/or *actual corruption* had occurred in the adoption of MP 2 because of the alleged "conditioning" of benefits on approval of the contribution agreement. (Exh. 285.3-285.6, 958.6 and 105; *see* 12 CT 3126:27-3127:1.) On December 6, 2002, the SDCERS president signed off on behalf of SDCERS on the MP 2 funding agreement. (Exh. 172; 12 CT 3127:1-2.)

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[15] November 18, 2002, is the date on which the City admits the allegedly wrongful acts giving rise to its causes of action, which the City claimed "had previously been concealed" by former Cross-Defendants Lexin, Webster, Vattimo, Saathoff, Torres and Wilkinson, were brought to "light" due to Shipione's actions. (City's 6ACC, ¶ 68, 13 CT 3244:20-27.) In addition to this pleading admission, however, evidence was admitted at trial showing that, as early as June 20, 2002, in a letter addressed to SDCERS Board Members, the Mayor and City Council, then private attorney, now City Attorney, Michael Aguirre challenged the City's proposal to amend MP 1 by lowering the trigger – suggesting that conflicts of interest might be involved, and threatening to file legal action within ten days in order to have the Board's approval rescinded and the trustees approving it removed. (Exh. 1221.) On behalf of an undisclosed client, Mr. Aguirre also addressed the SDCERS Board in a manner consistent with his letter, during its public session on June 21, 2002, and again on July 11, 2002. (Exh. 65.29-65.30 and 66.21) Following the Board's action on July 11, 2002, Mr. Aguirre told Union officials and the City that he was satisfied with the Board's decision and would not take the legal action he had threatened. (Testimony of Italiano, [20 RT 3316:18-3317:13], and Herring [27 RT 5140:2-5141:10]; Exh. 958.9-958.10.)

F. The *Gleason* Action Immediately Challenged MP 2

Barely *two months* after the SDCERS Board's vote on MP 2, litigation began challenging the funding arrangement between the City and SDCERS. On January 16, 2003, *Gleason I* (SDSC GIC803779) was filed against the City, SDCERS, and ten Individual Board Members alleging a cause of action for breach of fiduciary duty related to the alleged "underfunding" of SDCERS since 1996, which the *Gleason* plaintiffs alleged had rendered the pension trust fund actuarially unsound, thereby impairing their vested contractual rights. The *Gleason I* plaintiffs also alleged that the statute of limitations on their claim had been tolled due to alleged "concealment." The *Gleason* plaintiffs sought restitution of amounts owed, an injunction, money damages, and removal of the ten named trustees. (Exh. 961; *see* 12 CT 3127:3-7.) The City answered the *Gleason I* complaint in February 2003, but filed no cross-complaint. (Exh. 1434.)

Then, on May 16, 2003, a second suit – *Gleason II* (SDSC GIC810837) – was filed against SDCERS, seeking to have MP 2 declared void and the SDCERS Board's decisions of July 11, 2002, and November 15, 2002, invalidated under both the Political Reform Act, Gov. C. § 91003, subd. (b), and Gov. C. §§ 1090 and 1092. (Ex. 962.) The plaintiff in *Gleason II*, James Gleason, described himself as a "resident of the jurisdiction where the alleged conduct occurred in violation of conflict of

interest laws."[16] (Exh. 962.1, ¶ 2.) In June 2003, SDCERS answered the *Gleason II* complaint and filed no cross-complaint. (Exh. 1435.) The City was not a defendant in this action. On June 2, 2003, the *Wiseman* action was filed alleging that it was improper for City officials to appoint delegates to serve in their Charter-mandated seats on the pension board. The three cases were consolidated before Judge Patricia Cowett. The City was represented by outside counsel, as well as by the San Diego City Attorney's Office. (Exh. 964-2; *see* 12 CT 3127:8-17.) Multiple closed session conferences took place between the Mayor and City Council and the attorneys defending the City in *Gleason*: May 20, 2003 (Exh. 1173.1), June 24, 2003 (Exh. 1173.3), July 22, 2003 (Exh. 1173.4), September 23, 2003 (Exh. 1173.5), October 21, 2003 (Exh. 1173.6), February 3, 2004 (Exh. 1173.7), and March 9, 2004 (Exh. 1173.8).[17]

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[16] The trial court rejected Intervenors' argument that, in light of Mr. Gleason's having already done so, the City should be precluded from re-litigating a claim seeking to have MP 2 declared void due to an alleged violation of Gov. C. § 1090. The trial court found that the case on which Intervenors relied – *Gates v. Superior Court* (1986) 178 Cal.App. 3d 301 – was distinguishable as a taxpayer's action under C. C. P. § 526(a), and that there was an insufficient identity of interest between Mr. Gleason's interest in *Gleason II* and the City's interest in this case to conclude that the City was in privity with Mr. Gleason such as to bar its 1090 claim here. (12 CT 3146:4-3148:8.)

[17] During this time frame, the outside attorneys representing the City in *Gleason* also prepared written Memoranda informing the Mayor and City Council of pertinent issues related to the defense of *Gleason* and potential settlement opportunities – including an update Memorandum dated November 21, 2003, which specifically referenced the pending Gov. Code § 1090 claim in the consolidated *Gleason* cases. (Exh. 1224.) Assistant City Attorney Chris Morris, who together with outside counsel represented the

On March 16, 2004, Deputy City Attorney Chris Morris informed the Pension Reform Committee during a public session that a settlement in the consolidated *Gleason* cases had been reached and that "MP 1 and MP 2 (were) being terminated." (Exh. 1285.3.)

On April 6, 2004, a Notice was mailed to 6,330 *Gleason* class members concerning the Proposed Settlement and Fairness Hearing, acknowledging that the consolidated action included claims that "certain SDCERS' board members violated conflict of interest laws." (Exh. 965, 965-6, and 790.) On May 7, 2004, a hearing was held before Judge Cowett on the proposed Class Action Settlement. (Exh. 783.1:23-24.) A final hearing before Judge Cowett took place on July 7, 2004 (Exh. 783.1:23-24), followed by entry of Judgment Approving Settlement of *Gleason* Class Action on July 26, 2004. (Exh. 783.) The *Gleason* Judgment expressly states that "MP 1 and MP 2 shall terminate, and be of no further force or effect" (Exh. 783.2, ¶ 1 and 783.17(b)); and that the parties intend that the settlement "will have full res judicata and collateral estoppel effect with respect to all allegations asserted in the Actions." (Exh. 783.25, ¶ 19.)

The trial court found that the effect of the settlement "was to eliminate the funding relief provided the City by MP 1 and MP 2, and to

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City in the *Gleason* case, testified that, during the pendency of the case in 2003-2004, Assistant City Attorney Les Girard advised him that he (Girard) did not believe that Government Code section 1090 had been violated in connection with MP 1 or MP 2. (13 RT 1659:25-1660:17; 14 RT 1814:13-19.)

require the City to contribute funds to the pension and pledge property as collateral for this obligation," (Exh. 433), and that all members of the class were given notice and an opportunity to make objections to the proposed settlement (Exh. 789 and 790). (12 CT 3127:18-23.) Underpinning its later conclusion that the *Gleason* Judgment bars the City's claims against members of the *Gleason I* class (12 CT 3145:25-3146:3), the trial court found:

> (Assistant City Attorney) Morris testified the *Gleason* settlement was intended to dispose of the entire under funding claim relevant to both past employees and current employees. . . . It was a non-opt out class action. (Outside counsel to the City) Mr. Pestotnik confirmed the *Gleason* settlement eliminated the under funding provisions of MP 1 and MP 2. He also testified it did not deal with the benefits enacted by the City. (12 CT 3127:24-3128:3.)

Thus, by mid-July 2004, the City had terminated MP 1 and MP 2 with the City's pension legislation intact and its pension promises still being honored.

G. Recap of Key Dates/Events

Date	Event
6/21/96	SDCERS Board approved MP 1. (Exh. 82B.)
2/25/97 through 3/31/97	City enacted MP 1 pension legislation. (Ex. 1105, 238, 230.)
5/13/97	City adopted Resolution approving MP 1-related MOU's with City Unions. (Ex. 1111.)

6/29/98	City adopted Resolution approving new MOU's with City Unions. (Ex. 1112.)
5/17/00	*Corbett* Judgment entered. (Ex. 930.)
7/31/00	City adopted Resolution approving new MOU's with City Unions. (Ex. 1113.)
6/21/02	City alleges in its 6ACC that SDCERS Board "approved" MP 2 "in principal." (13 CT 3243, ¶ 59.)
10/21/02	City adopted Resolution approving new MOU's with City Unions, including "MP 2" pension benefits. (Ex. 73.)
11/15/02	SDCERS Board approved MP 2. (Ex. 742.)
11/18/02	City alleges in its 6ACC that unlawful acts giving rise to its claims came to "light." (13 CT 3243, ¶ 68)
7/26/04	*Gleason* Judgment entered. (Ex. 783.)
7/8/05	City files cross-complaint challenging MP 1 and MP 2 pension benefits. (1 CT 1-28.)

H. As of November 17, 2006, the Market Value of the City's Assets in SDCERS Was $4.1 Billion and The City Had Contributed More Than $400 Million Since July 1, 2005

In its Opening Statement at trial, the City pled poverty:

- "This (case) is not about taking away benefits, because an unfunded benefit does not exist. This is about restoring the actuarial soundness of the system." (10 RT 969:12-16; 973:28-974:2.)

- "We will show that the problem here is not about robbing the pensioners of their pensions. It's about informing the pensioners that they don't have the pensions that they think they have because the money is not there to pay for it." (10 RT 970:3-7.)

- "The City has no plan to pay and no ability to pay. This is an accounts receivable that's not being paid." (10 RT 973:23-25.)

Not only was the City's plea of poverty irrelevant and unnecessary to the claims at issue, it was factually wrong.

During the trial of Phase One issues, the testimony of SDCERS' Chief Investment Officer Doug McCalla established that the market value of the City's assets in SDCERS as of November 17, 2006, was *$4.1 billion* (29 RT 5387:8-5389:12; Exh.1474), and that between July 1, 2005, and November 2006, the City had made $432,777,211.63 in employer contributions to SDCERS, as follows: $163 million in July 2005; $100 million on June 21, 2006; $7,777,211.63 on June 30, 2006; and $162 million in July 2006. (29 RT 5380:13-5383:12; Exh. 1473.)

The City's expert actuary Joseph Esuchanko testified that by 2000, despite the implementation of MP 1, SDCERS had reached a *funded status* of 105%, with assets exceeding actuarial liabilities. (24 RT 4320:16-4321:3.) Further, he said, the City is current on all payments owed to SDCERS, including the $162 million payment calculated by SDCERS' actuary for fiscal year 2007, which Mr. Esuchanko agreed was the proper amount to amortize the City's unfunded liability. (25 RT 4622:10-14.) Finally, Mr. Esuchanko offered this reassurance: "Assuming the unfunded

liability is properly amortized and paid off, there is no reason to believe this fund won't continue to make all prescribed payments for the foreseeable and indefinite future." (25 RT 4622:15-20.)

Thus, the City's cross-complaint seeking to undo its pension promises was never about the City's *ability* to live up to them. The objective, instead, is to bail the City out of those promises in order to lessen the pain of the City's having repeatedly, knowingly, and confidently deferred those obligations over the years.

III.

STATEMENT OF THE CASE

To say that the City has had its "day in court" is a vast understatement. The detailed factual and legal analysis demonstrating why the City's theories failed is contained in the trial court's 43-page Statement of Decision, Phase One, filed on January 18, 2007, (12 CT 3113-3155), after a month-long trial of special defenses to the City's 5ACC, and in the trial court's 20-page Order sustaining Intervenors' demurrer to the City's 6ACC without leave to amend, filed on August 3, 2007. (13 CT 3418-3437.) These two decisions followed nearly three years of intense litigation with a high political profile – and came only after multiple pre-trial motions had been carefully evaluated and decided, and all parties had been given a full opportunity to be heard – and reheard.

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A. Pre-Trial Evolution of the Pleadings and Parties

1. The City's Evolving Cross-Complaint Challenging the Legality of Pension Benefits

The trial court observed: "The City's longstanding approach of not challenging the benefits changed with the filing of its first cross-complaint on July 8, 2005." (12 CT 3116:5-6.)

The City's original Cross-Complaint, (1 CT 1-28), was followed by a First Amended filed on July 16, 2005, (1 CT 29-59), a Second Amended on August 3, 2005, (1 CT 145-172), a Third Amended on September 30, 2005, which omitted the City as a Cross-Complainant and named San Diego City Attorney Michael J. Aguirre as the sole complaining party, (2 CT 272-287), a Fourth Amended on February 8, 2008, with the single Cross-Complainant again being the City of San Diego, (3 CT 521-534), and a Fifth Amended on May 3, 2006, (4 CT 945-974), on which a trial of special defenses eventually took place.

At every turn, a patient trial court offered the City a full opportunity to state and re-state its claims in response to multiple challenges: a demurrer to the City's Second Amended Cross-Complaint was overruled in part and sustained in part with leave to amend (1 CT 196-204); a demurrer to the Third Amended was sustained with leave to amend (2 CT 519); a demurrer to the Fourth Amended was sustained with leave to amend (4 CT 866-869); a demurrer to the Fifth Amended was overruled (9 CT 2247-2250); and a non-statutory motion to strike the 5ACC denied (9 CT 2165-2166).

2. Separate Declaratory Relief Actions Filed and Consolidated

Within days of the City's filing its original cross-complaint challenging the legality of pension benefits, SDCERS filed a Complaint against the City, seeking a declaration that it could lawfully pay the MP 1 and MP 2 pension benefits.

Applications of the San Diego Municipal Employees' Association, AFSCME Local 127, and the San Diego City Firefighters Local 145 for leave to intervene were granted on August 10, 2005, (1 CT 173), and their Complaints in Intervention filed the same day. (1 CT 174-187; 139-144; 189-195.)

Meanwhile, on August 23, 2005, a group of individual plaintiffs ("*Abdelnour* Plaintiffs") filed a Complaint for Declaratory Relief related to the challenged pension benefits. This action was subsequently consolidated with the SDCERS Declaratory Relief Action in which the Unions had intervened, and, thereafter, the entire action was consolidated with the case in which the City's cross-complaint was pending. (2 CT 518.)

3. The City Dismissed All Individual Cross-Defendants

On June 14, 2006, the City filed a voluntary dismissal of all claims in its 5ACC against former SDCERS Board Members Saathoff, Lexin, Webster, Vattimo, Torres, and Wilkinson, and dismissed its petition for writ of mandate action against John Torell (City Auditor). (7 CT 1619.)

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B. The Pre-Trial Motion Phase Left The City's Claims Intact

The trial court denied all efforts to achieve dispositive rulings on the City's claims before trial, denying the City's Motion for Summary Adjudication in its favor on the Complaints filed by SDCERS, Intervenors, and the *Abdelnour* Plaintiffs (9 CT 2167-2174; 9 CT 2247-2255); and, later denying Intervenors' Motion for Summary Judgment/Summary Adjudication on the City's 5ACC, as well as Intervenors' Motion for Judgment on the Pleadings and/or to Dismiss the City's 5ACC. (11 CT 2747-2758.)

The City's Petition for Writ of Mandate directed to this Court seeking relief from the denial of its Motion for Summary Judgment/Adjudication was denied following Intervenors' response to this Court's request for informal letter briefing. (See D049105.)

C. The Stipulation Between the City and SDCERS Ending SDCERS' Active Involvement in Defending Pension Benefits

On the eve of a trial of special defenses to the City's 5ACC, the City and SDCERS filed a Stipulation whereby the City dismissed with prejudice its Third Cause of Action against SDCERS for a Writ of Mandate, and SDCERS, as the sole remaining Cross-Defendant on the City's 5ACC, agreed "to be bound by all orders of the Court, including final judgment, as to the legality of pension benefits at issue." (11 CT 2852-2853.) Accordingly, as of October 26, 2006, SDCERS and its attorneys ended their defense of the pension benefits at issue and took no role in establishing the

special defenses to the City's 5ACC – or, thereafter, in responding to the City's sixth amended cross-complaint filed on May 10, 2007.

D. The Statement of Decision Following Phase One of the Trial

The trial court filed its Proposed Statement of Decision on December 14, 2006, (12 CT 3016-3053), and the City's Objections followed. (12 CT 3061-3088). After a discretionary hearing, (31 RT 5901), the trial court filed its final Statement of Decision, Phase One, on January 18, 2007. (12 CT 3113-3155.)

In a nutshell, this decision concluded that Intervenors had, for the most part, established the special defenses at issue, thereby barring the City's MP 1 claim in its entirety, and leaving the City the option to pursue a limited MP 2 claim against a reduced number of pension plan participants. The size of this group remained uncertain but definitively excluded all members of the *Gleason I* plaintiffs' class and – based on the City's sworn discovery responses – all those current employees who have "paid-for" MP 2 benefits "on a going forward basis." The trial court ordered the City to bring these absent but necessary parties before the Court should it wish to proceed. (12 CT 3149:27-3151:8.) The trial court did not reach but remained troubled over the fifth special defense to the City's 5ACC which addressed whether the court could render a meaningful, concrete and specific declaratory decree.[18] Because the case had been substantially

[18] This issue focused on the remedies the City had proposed pre-trial and during its Opening Statement. In sworn discovery responses on

narrowed by the other phase one rulings, however, this issue was deferred and eventually rendered moot. (12 CT 3149:3-25.)[19]

The City sought extraordinary relief from the rulings contained in the trial court's Statement of Decision. The City's Petition directed to this Court, (see D050181), and another directed to the California Supreme Court, (see S151259), were both denied.

E. The Partial Dismissal of *Abdelnour* Plaintiffs

On March 15, 2007, one hundred thirty-seven (137) of the *Abdelnour* Plaintiffs voluntarily dismissed their complaint for declaratory relief, leaving fifty-seven (57) remaining *Abdelnour* Plaintiffs. (12 CT 3156.)

F. The City's Sixth Amended Cross-Complaint Filed May 10, 2007

The City filed its 6ACC on May 10, 2007, naming as Cross-Defendants for the first time: "All Persons Who Currently Claim, Or Who

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October 2, 2006, the City stated that a Special Master should be appointed "to determine the practical effects of rescinding the ordinances that created the illegal benefits." (Ex. 1260.53-58 and 1260.61-63.) In Opening Statement, the City stated that a 90-day stay should follow the trial court's declaration that MP 1 and MP 2 are void to "permit the parties to move their dispute back to the political process by seeking a resolution before the Council, or intervening in this action . . . to allow the City through its City Council and Mayor to take further action to resolve all outstanding claims by settlement or otherwise . . . [as] there may be people that come forward with . . . particularized claims." (10 RT 999:8-10; 998:5-7; 1001:2-3.)

[19] The trial court's final Statement of Decision also included this cautionary note: "In the Objections to the Proposed Statement of Decision, the City raises several arguments outside the allegations of the 5ACC and seeks to change certain discovery responses post trial. The City cannot change the theories and evidence from that tried and plead for the first time after trial." (12 CT 3119:1-3.)

May Claim, Any Right, Whether Or Not Currently Vested, To Receive Benefits From SDCERS As A Result Of Any Person's Employment With The City Of San Diego For Which Said Persons Have Not Contributed Their Full Actuarilly (sic) Determined Amount To Pay For Said Benefits." The City also named the *Abdelnour* Plaintiffs and each Intervenor Union as Cross-Defendants for the first time, as well as the San Diego Police Officers' Association ("POA").[20] (13 CT 3228-3229.)

G. Intervenors' Demurrer to the City's 6ACC Was Sustained Without Leave to Amend

While Intervenors' demurrer to the City's 6ACC was under submission following oral argument on June 28, 2007, new developments related to the statute of limitations applicable to the City's claims resulted in supplemental briefing and additional oral argument. (13 CT 3390; 3394; and 3402.) The trial court filed its Order sustaining Intervenors' demurrer without leave to amend on August 3, 2007, (13 CT 3418-3437), followed by a Judgment of dismissal on September 17, 2007. (13 CT 3454-3455.)

IV.

STATEMENT OF APPEALABILITY

Intervenors acknowledge that SDCERS has a motion pending which challenges the City's appeal as premature because the Judgment dismissing the City's 6ACC in its entirety is not a final disposition of the case as to all

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[20] Only fifty-seven *Abdelnour* plaintiffs remained in the case. (12 CT 3156.) By order of the trial court, the POA, as a new cross-defendant, was not served with this 6ACC. (13 CT 3226-3227.)

claims and all parties. However, the Judgment does represent a final disposition of the City's pension take-away claims against retirees, employees, and beneficiaries who were never joined as parties, and, thus, is ripe for review. Intervenors urge this Court to decide the City's appeal without further delay and expense to the parties who have responded to this appeal on its merits.

V.

STANDARDS OF REVIEW

The City asserts that each of the trial court's five substantive rulings leading to the dismissal of its cross-complaint involves "stark legal error." Respondents address the applicable standard of review when discussing each of these rulings.

VI.

DISCUSSION

A. The City's Claims Are Time-Barred With Or Without The Joinder Of Necessary Parties

1. Standard of Review

This Court reviews the sufficiency of a complaint against a general demurrer under long-settled rules. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The demurrer admits all material facts properly pleaded but not contentions, deductions or conclusions of law; matters judicially noticeable are considered. (*Ibid.*) When a demurrer is sustained, this Court determines whether the complaint states facts sufficient to constitute a cause of action.

When a demurrer is sustained without leave to amend, this Court decides whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, reversal follows for an abuse of discretion; if not, this Court affirms. (*Ibid.*) The burden of proving such reasonable possibility is squarely on the plaintiff. (*Ibid.*)

The running of a statute of limitations must appear "clearly and affirmatively" from the dates alleged on the face of the complaint, or from matters judicially noticeable. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403; see *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) (13 CT 3436:2-5.) Where it is established that a cause of action is barred by the statute of limitations, a demurrer must be sustained on the ground that it fails to state facts sufficient to constitute a cause of action. *McFaddin v. H. S. Crocker Co.* (1963) 219 Cal.App.2d 585.

2. The Trial Court Correctly Applied A One-Year Statute of Limitations to the City's Claims

a. The Pre-*Brandenburg* State of the Law

When trial began on the City's 5ACC, the statute of limitations applicable to the City's claims to void its MP 1 and MP 2 pension legislation under Government Code sections 1090 and 1092 remained uncertain. Two cases had foreshadowed the eventuality that a one-year rather than a three-year statute of limitations might apply due to the forfeiture involved. In *Thomson v. Call* (1985) 38 Cal.3d 633, the California Supreme Court observed that a governmental agency recovers

any consideration paid without restoring the benefits received when a contract is declared void for a prohibited financial interest. This "substantial forfeiture," the court wrote, is the means to provide *public officials* with a strong incentive to scrupulously avoid conflict-of-interest situations. *Id.* at 650.

Nearly two decades later, *Marin Healthcare District v. Sutter Health* (2002) 103 Cal.App.4th 861, established two fundamental principles applicable to actions to void contracts under Government Code sections 1090 and 1092: first, such actions *are* subject to a statute of limitations despite the argument that the contract is "void" *ab initio* (*Id.* at 872 and 879); second, an action to void a contract accrues on the date the contract is *made* because this is when the public entity *becomes bound*, sustaining "actual and appreciable harm" or a "manifest and palpable injury." (*Id.* at 874-875 and 879-880.)

However, in *Marin Healthcare*, twelve (12) years had elapsed between the date the offending contract was made and when the action was filed. Thus, the discussion over which of three limitations periods (one, three or four years) should apply became academic since the action was time-barred by application of the *most* generous 4-year "catch-all" statute of limitations set forth in Code of Civil Procedure section 343. *Marin Healthcare* did observe, however, that such an action may be governed by the one-year statute of limitations applicable to "an action upon a statute for a penalty or forfeiture," Code Civ. Proc. § 340(1), because the object of the

statutory action is a forfeiture – the "divestiture of property without compensation" or the "loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." *Id.* at 877. Thus, as of November 2002, when the *Marin Healthcare* decision was filed and review denied, potential litigants were forewarned that a one-year statute of limitations might apply to actions seeking to void contracts made in violation of Government Code section 1090.

b. The *Brandenburg* Decision

Brandenburg v. Eureka Redevelopment Agency (2007) 152 Cal.App.4th 1350, concluded that the one-year statute of limitations set forth in Code of Civil Procedure section 340, subd. (a) applies to civil claims seeking to void a prohibited contract under Government Code sections 1090 and 1092 because it is an "action upon a statute for a penalty or forfeiture." *Brandenburg, supra*, 152 Cal.App.4th 1350, 1364-1365.

The trial court correctly determined that *Brandenburg* was binding on courts of inferior jurisdiction (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455). However, the trial court also agreed with the result: "The court finds the analysis of *Brandenburg* persuasive and finds a one-year statute of limitations period applicable because the City's claims

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under Government Code section 1090 involve a forfeiture of benefits."[21] (13 CT 3436:28, fn. 1.)

c. The City Agrees That Its Claims Seek A "Forfeiture" Of Pension Benefits But Argues That *Brandenburg* Was Incorrectly Decided

The City does *not* dispute the trial court's conclusion that its claims seek a forfeiture of pension benefits. Instead, the City first argues that "it is apparent that *Brandenburg* is incorrectly decided," offering no particulars as to why or how the *Brandenburg* court misinterpreted Code of Civil Procedure section 340, subd. (a), or misapplied it to this "action upon a statute for a penalty or forfeiture." (See AOB at 91.) The City ignores altogether the fact that, on October 10, 2007, the California Supreme Court denied both a request to review and a request to depublish *Brandenburg*.

Next, the City argues that *Marin Healthcare* is the "better-reasoned" appellate authority, (AOB at 91-92), but overlooks the fact, as explained above, that *Marin Healthcare* is *not* authority for a four-year statute of limitations because the selection of one of several potentially applicable statutes of limitations was not necessary on the facts of the case.[22]

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[21] "While the City argues . . . that they do not seek a judgment against individual employees, they are seeking a ruling terminating individuals' vested pension rights. The City . . . continuously reminds the Court of the automatic disgorgement provisions under § 1090." (12 CT 3138:17-25.)

[22] While the City argues for a 4-year statute of limitations instead of the *Brandenburg* one-year rule, the City does not explain how its claims filed against *new* cross-defendants on May 10, 2007 – *more than four years* after its claims admittedly accrued – would nevertheless be timely. They

Finally, the City complains that the *Brandenburg* one-year rule provides "only a narrow window" for pursuing civil conflict-of-interest cases when a three-year statute of limitations applies to criminal charges brought under Government Code section 1090." (AOB at 92.) However, the legislature, not the courts, determines the statutes of limitations applicable to civil and criminal claims, and the fact that the limitations period is different is irrelevant. Moreover, the City offers no logical reason why the statute of limitations on its civil claim seeking a forfeiture of pension benefits from innocent retirees, beneficiaries and employees, who did *not* violate Government Code section 1090, should be the same as the statute of limitations on a criminal charge against a person who allegedly *did* violate section 1090. Indeed, the City abandoned its civil disgorgement claims against the persons it alleges *did* violate section 1090. (7 CT 1619.)

Nor does the City explain why a one-year statute of limitations was not an adequate "window" for pursuing its claims. The undisputed evidence proves that it was. The trial court found: "This is not like other cases dealing with Government Code section 1090 violations involving secret meetings with outside third parties. The key votes establishing the agreements at issue were part of the public record." (13 CT 3430:20-23.)

Moreover, the City does not deny what the trial court found: that, by the City's own pleading admission, it was put on notice of its claims at least

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would not be.

by November 18, 2002. (13 CT 3244, ¶ 68; see *infra* at 52.) And, on May 16, 2003, within six months of the "making of MP 2," a resident of the City of San Diego filed suit (*Gleason II*) seeking to void MP 2 for alleged violations of Government Code section 1090. (See II, Statement of Facts, Section F, *supra*, at 23.) The City does not deny what the trial court also found: that it had knowledge of the *Gleason II* case *before* the one-year statute of limitations had elapsed. (See *infra* at 53.) Thus, the City had knowledge, notice, and an opportunity to file its claims within the one-year statute of limitations.

d. The City's Final "Long-Shot" Argument About "Continuing Payment Obligations" Also Fails

The City's final "long-shot" argument in footnote 32 on the penultimate page of its 93-page brief nevertheless warrants a definitive answer. The City asserts that the "statute does not run when there are continuing payment obligations under an invalid law." The notion appears to be that the City's cause of action to void the MP 1 and MP 2 transactions does not accrue, and the statute of limitations does not begin to run, so long as the City owes any retiree or beneficiary a pension benefit under MP 1 or MP 2, or conversely, that a new cause of action accrues each time it fulfills its payment obligations related to this legislation. To the contrary, *Marin Healthcare*, and each of the cases the City cites in footnote 32, apply the well-established principle that a cause of action accrues and the statute begins to run when a statutory *violation* occurs.

Marin Healthcare specifically established that statutes of limitation *do* apply to claims under Government Code sections 1090 challenging contracts alleged to be void *ab initio*, and that a claim accrues on the date the public entity becomes bound by the allegedly tainted contract. (*Marin Healthcare District*, *supra*, 103 Cal.App.4th 861, 872, 874-875 and 879-880.) In reaching this conclusion, *Marin Healthcare* acknowledged the sound policy arguments for and against applying a limitations period in such cases. On the one hand, cases should be decided on their merits and the public should not lose its rights through the "negligence of its agents in failing to bring suit promptly." *Id.* at 872. On the other hand:

> Statutes of limitations also serve many other salutary purposes, including protecting settled expectations; giving stability to transactions; promoting the value of diligence; encouraging the prompt enforcement of substantive law; avoiding the retrospective application of contemporary standards; and reducing the volume of litigation. *Ibid.*

Ultimately, *Marin Healthcare* concluded that the courts must defer to the California legislature which has exercised its judgment in the matter and imposed statutes of limitation in every civil action *without exception* – including actions brought by public entities to enforce the public policy goals of Government Code section 1090. *Id.* at 872-874. Had the *Marin Healthcare* court determined, instead, that a *new* cause of action for violation of Government Code section 1090 accrued each time obligations required by the offending contract were performed, the result would have

been different as the 12-year lapse between the date the contract was made and when the action was filed would have been irrelevant.

Here, as was true in *Marin Healthcare*, the City's claims arise from the SDCERS Board's votes approving the allegedly *quid pro quo* MP 1 and MP 2 transactions on June 21, 1996, and June 21, 2002, respectively, while under the influence of allegedly prohibited financial interests. (See 6ACC, ¶¶ 48 and 59, 13 CT 3241.) Thus, on each of these dates, the alleged statutory violation occurred, the City's cause of action accrued, and the statute of limitations began to run.[23]

The cases the City cites related to the enforcement of *pensioners'* statutory rights against pension systems for the *payment* of vested benefits do not support the City's argument. Each turns on the nature of the primary right which constitutes the cause of action and when it accrued.

On the one hand, in *Dillon v. Brd. of Pension Commr's of the City of Los Angeles* (1941) 18 Cal.2d 427, the widow of a police officer who committed suicide waited more than three years to seek mandamus after her application for a pension was denied, and the last element of her claim had occurred. Her cause of action was time-barred.

On the other hand, in *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 462-464, a pensioner's beneficiary had a timely claim for underpayment of the vested amount owed because a *new* claim accrued

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[23] The City's argument that the statute of limitations on these claims was tolled due to fraudulent concealment is addressed *infra* at 51.

each time the City *violated* its statutory duty to pay this amount; and at issue in *Dryden v. Brd. of Pension Commr's of the City of Los Angeles* (1936) 6 Cal.2d 575, was the effect of a City Charter claims procedure on the rights of a police officer's widow to apply for a pension to which she was otherwise entitled under the City's pension statute. She filed her claim ten months after her husband's death when the City's claims procedure required claims to be made within six months "after the last item accrued." The court held that a public entity's duty to pay a pension pursuant to statute is a continuing one and thus the widow of a deceased police officer had a continuing right to receive the promised pension. Accordingly, she did not forfeit her right to a pension merely because she delayed four months in making her claim, though her recovery for past benefits would be limited to the 6-months claims period.

Here, the primary interest invaded by the alleged wrongful conduct underlying the City's claims was the City's right to be free from contracts made under the influence of prohibited financial interests. This interest was invaded, the harm Government Code section 1090 seeks to prevent occurred, and the City's claims accrued when, as the City alleged, SDCERS Board Members voted to approve MP 1 and MP 2.

Next, the City reaches for cases related to the enforcement of public rights in a context where each present infringement is a *new* violation of law: *Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809, 825 [the express terms and intent of Proposition 62 established

that, not only is the initial enactment of a tax ordinance without voter approval a violation of law, but each *collection* of the unconstitutional tax thereafter is a *new violation* from which a new cause of action accrues]; and *Pac. Gas & Elec. v. City of Union City* (N. D. Cal. 2002) 220 F. Supp,2d 1070, 1081-1082 [applying *Howard Jarvis* in finding that each time a municipality imposes an allegedly unconstitutional street damage restoration fee, a *new violation* occurs and thus a new cause of action accrues].

Here, the alleged statutory violation occurred on the dates the MP 1 and MP 2 contracts were made, and there is no authority for the proposition that a *new* violation occurs each time the City fulfills the payment obligations under these contracts; in fact, *Marin Healthcare* holds just the opposite.

Finally, the law is settled that the "continuing violation" doctrine extends the applicable statute of limitations on unlawful acts occurring *outside* the limitations period only when these acts are sufficiently linked *to unlawful acts inside the limitations period* to form a single violation giving rise to liability. *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812 (emphasis added.) Even then, the continuing violation doctrine does not apply unless the alleged unlawful acts are (1) sufficiently similar in kind; (2) have occurred with reasonable frequency, and (3) have not acquired a degree of permanence. *Id. at* 823. Moreover, "a continuing violation is

occasioned by continual unlawful acts, not by continual ill effects from an original violation." *Ward v. Caulk* (9th Cir. 1981) 650 F.2d 1144, 1147.

Here, the City alleges that unlawful acts occurred on dates certain when the SDCERS Board voted to approve MP 1 and MP 2. Although the City alleges that these unlawful acts were fraudulently concealed, the City does not allege that any other unlawful acts gave rise to its claims other than these. Thus, there is no conceivable basis on which the "continuing violation doctrine" could apply to the City's claims. With no unlawful acts having allegedly occurred *within the limitations period*, this doctrine cannot extend the statute of limitations on allegedly unlawful acts occurring *outside the limitations period.*

In short, the City's payment obligations under MP 1 and MP 2 are merely the continuing *effects* of the transactions at issue. Since the City's claims accrued, and the statute began to run, when the so-called "benefits-for-underfunding" contracts were made – or later when these unlawful acts were brought to "light" as alleged in the City's 6ACC, ¶ 68 – these untimely claims are not saved by the continuing violations doctrine, or by reference to cases enforcing the statutory rights of pensioners who sue for pensions owed, or of the public when suing to stop unconstitutional taxes and fees.

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3. AB 1678 Did Not Change the Effect of *Brandenburg* Because It Did Not Become Law Until January 1, 2008, When The City's Claims Were Already Time-Barred

a. AB 1678 Was A Non-Urgency Bill

The Governor signed AB 1678 on July 12, 2007, after the legislature passed it as a non-urgency bill, making the statute of limitations applicable to a claim for violation of Government Code section 1090 "four years after the plaintiff has discovered or in the exercise of reasonable care should have discovered the violation." The trial court noted that AB 1678 is presumed to be prospective only in operation (*People ex. Rel. City of Bellflower v. Bellflower County Water Dist.* (1996) 247 Cal.App.2d 344; C. C. P. § 3). (13 CT 3425:10-14.)

Pursuant to California Constitution, article IV, sections 8(c) and (d), and Government Code section 9600, as a "non-urgency" bill, AB 1678 took effect on *January 1, 2008*, but not before. The California Constitution, article IV, section 8, subdivision (c), paragraph (1), and Government Code section 9600 establish the effective date of any non-urgency statute as being "on January 1 next following a 90-day period from the date of enactment of the statute" if enacted at a regular session. Government Code section 9600 provides in pertinent part as follows:

> (a) Except as provided in subdivision (b), a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute . . .
>
> (b) Statutes calling elections, statutes providing for tax levies or appropriations for the usual current expenses of the state,

> and urgency statutes shall go into effect immediately upon their enactment.

"Urgency statutes" are defined in the California Constitution, article IV, § 8, subd. (d). AB 1678 is a self-described non-urgency bill. (13 CT 3415.) It *became law* on January 1, 2008, but *not before* that date. In *People v. Righthouse* (1937) 10 Cal.2d 86, the California Supreme Court emphasized:

> . . . a statute has no force whatever until it goes into effect pursuant to the law relating to legislative enactments. It speaks from the date it takes effect and not before. Until that time it is not a law and has no force for any purpose. (citations omitted.) So where the legislature passes an act to amend a statute then existing, the latter remains in full force during the time between the passage of the amendatory act and the time it becomes effective. *Id.* at 88.

See also *Krupnick v. Duke Energy Morro Bay* (2004)115 Cal.App.4th 1026, 1028 [Legislature amended section 340, subdivision (3), to delete the one-year limitations period for personal injury actions, and added section 335.1, providing a two-year statute of limitations for such actions; the changes were made during the Legislature's 2001-2002 Regular Session and therefore became effective on January 1, 2003 (Gov. C. § 9600, subd. (a).)]

b. AB 1678 Was Not A Clarification of Existing Law

Moreover, the legislative history makes clear that AB 1678 constituted a *change in existing law.* AB 1678 had been amended several times prior to its enactment; one such amendment dated May 14, 2007, *deleted* the following language which had appeared in prior versions of the bill: "Section 2. The amendment of Section 1092 of the Government Code made by Section 1 of this Act does not constitute a change in, but is

declaratory of, existing law." (13 CT3416-3417.) At the time of AB 1678's final passage by the Assembly on June 28, 2007, the decision in *Brandenburg, supra*, 152 Cal.App.4th 1350 had not yet been filed. In fact, by the time the *Brandenburg* decision was filed on July 2, 2007, AB 1678 had already been enrolled and was on the Governor's desk for signing.

The City admitted during supplemental oral argument on Intervenors' demurrer that it "could not in good faith" make the assertion that AB 1678 was a "clarification of existing law." (35 RT 6183:13-26; 13 CT 3425:19-28.) On appeal, the City shamelessly disavows this concession and argues that the legislature intended only to "clarify" the law. Yet, as the trial court noted in its Order sustaining Intervenors' demurrer, the City conceded during oral argument on the issue that it "could not in good faith" make this assertion. (*Cf.* AOB at 90, and 13 CT 3425:19-28.)

Finally, staying the case until January 1, 2008, as the City urged below, would have been to no avail. Once it took effect on January 1, 2008, AB 1678 could not save the City's claims because they were already barred by the one-year statute of limitations and could not be revived on that date. (*Krupnick v. Duke Energy Morro Bay* (2004) 115 Cal.App.4th 1026, 1029; *Mojica v. 4311 Wilshire, LLC* (2005) 31 Cal.App.4th 1072-1073.) (13 CT 3424:24-3428:13.)

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4. The City's Claims Are Time-Barred Based On Its Pleading Admissions And Matters Judicially Noticeable

a. The Date On Which The City's Claims Accrued Is Undisputed and Undeniable

In its 6ACC, the City alleges that certain SDCERS Board Members violated Government Code section 1090 when they approved MP 1 on June 21, 1996, and MP 2 on June 21, 2002. (6ACC, ¶¶ 48 and 59, 13 CT 3241 & 3243.) (See also 13 CT 3428:20-21.) The City also alleges that the statute of limitations on its claims was tolled due to fraudulent concealment until the wrongful actions giving rise to its claims were brought to "light" on November 18, 2002, due to the activities of SDCERS Board Member Diann Shipione.[24] (6ACC, ¶ 68, 13 CT 3244.)

In addition to the City's pleading admission establishing the accrual date for its claims, the trial court took judicial notice of court records establishing that the City had notice of the *very same 1090 claim* related to MP 2 being asserted in this case because of the filing of the *Gleason II* case on May 15, 2003. "While the City was not a party to *Gleason II*, it was named as a defendant in the *Gleason I* action. The *Gleason I* and *Gleason II* actions were consolidated before Judge Cowett on September 23, 2003, and a settlement was eventually reached. Thus, the City certainly had knowledge of the facts underlying the Government Code section 1090

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[24] A party who relies on a "tolling" allegation to excuse its otherwise untimely action must specifically plead facts showing the time and manner of discovery. *Barrington v. A. H. Robins Co.* (1985) 39 Cal.3d 146.

allegations on May 15, 2003, or at the latest on the date of consolidation which was September 23, 2003. (Statement of Decision, 15:8-12; Minute Order of 9-23-03 from GIC 803779.)" (13 CT 3431:22-3432:7.)

b. The Proponent of the Doctrine of Fraudulent Concealment Must Show Due Diligence

The trial court correctly noted that, while the judicially-created doctrine of fraudulent concealment delays the accrual date of a cause of action, it "does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim," because "a plaintiff is under a duty to reasonably investigate, and a suspicion of wrongdoing, coupled with a knowledge of the harm and its cause, commences the limitations period." (*Snapp & Associates Ins. Services, Inc. v. Malcolm Bruce Burlingame Robertson* (2002) 96 Cal.App.4th 884, 890.) (13 CT 3429:9-23.)

c. Giving The City The Benefit of a Dubious Tolling Argument Still Does Not Save Its Original Claims

In concluding that the City's tolling argument was insufficient to save its claims, the trial court cited paragraphs 64 and 68 of the City's 6ACC wherein the City admitted that its claims accrued on *November 18, 2002*, when the "intentionally concealed unlawful actions," which the City acknowledges are the "factual basis underlying this action," came "to light" because SDCERS Board Member Diann Shipione sent a letter on that date raising four major concerns with MP 2, including an assertion that the

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conduct associated with it was "ethically questionable, if not blatantly corrupt." (13 CT 3430:1-9, emphasis in original.)

Accordingly, the trial court held: "Based on the face of the sixth amended cross-complaint, the date for the accrual of the Government Code section 1090 cause of action was November 2002. The original cross-complaint filed in July of 2005 is time barred, because more than one year has elapsed by the facts alleged on the face of the complaint. Knowledge of the City's executives and elected officers is imputed to the City. (*McKelvey v. Boeing No. American, Inc.* (1999) 74 Cal.App.4th 151, 160.)." (13 CT 3429:25-3430:16.) [25]

Nor can the City credibly contend that it lacked knowledge of the alleged financial interests of the SDCERS Board Members when voting to approve MP 1 and MP 2 at its urging. The trial court found:

> The Board's actions had to be approved by the City. . . . The basis for the alleged financial interest cannot have been concealed since the pension board membership by City Charter was made up, in part, of individuals who were financially interested in pension benefits. Under San Diego City Charter, article IX, section 144, a portion of the pension board was made up of city employees. . . . Therefore, based on the sixth amended cross-complaint and matters judicially noticeable, the City was on notice of the Board's actions and the alleged Government Code section 1090 violations as early as November 18, 2002. (6ACC, ¶ 68.) . . . . Complacency

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[25] Permitting the City to invoke the fraudulent concealment doctrine *at all* was generous because, as the trial court also found, the City itself had "created, lobbied for, and implemented" these allegedly prohibited contracts. (12 CT 3119:25-3120:1.)

under these alleged facts does not toll the statute of limitations." (13 CT 3430:17-3431:20.)

Giving the City "the greatest latitude based upon the pleadings," the trial court concluded that, though the likely date of accrual for its claims was November 18, 2002, the statute of limitations cannot be tolled beyond September 23, 2003. Accordingly, the one-year statute of limitations bars the City's original complaint filed on July 8, 2005, and "there are no grounds to add new parties." (13 CT 3432: 8-17.)

d. The City Does Not Challenge The Trial Court's Findings

The City does *not* deny the accuracy of the trial court's findings regarding the accrual dates for its claims. In fact, nowhere in its 93-page Opening Brief, does the City even mention its case-ending pleading admission regarding the accrual of its claims. Nor does the City explain, once it does address the dispositive statute of limitations issue beginning on *page 85*, why or how the trial court allegedly erred by applying the statute of limitations to the dates the City itself pled on the face of its cross-complaint. Nor does the City even *suggest* how this fatal pleading admission could be permissibly overcome by amendment. Indeed, a party cannot disprove admissions in its pleading, as evidence contrary thereto should not be considered. *Driver, et al. v. International Air Race Association* (1942) 54 Cal.App.2d 614, 620.

Moreover, the City does not argue that the trial court abused its discretion in denying it leave to amend its 6ACC *or* that the defect

appearing on the *face* of its 6ACC could be cured by amendment. In fact, the City does *not* seek leave to amend by its appeal.[26]

The City simply argues that the trial court's "evidentiary assessment was premature" – without arguing that it was *wrong* – because the trial court's September 2006 order granting a trial of special defenses to its 5ACC had deferred a trial of Intervenors' statute of limitations affirmative defense until phase two (assuming any claims survived phase one). (10 CT 2419-2420.) The City argues, as it did below, that it was *entitled* to a trial on the tolling allegations asserted in its 6ACC because a *year earlier* in the case (and *before* the *Brandenburg* decision established a one-year statute of limitations), the trial court had overruled Cross-Defendant SDCERS' demurrer to the City's 5ACC on the ground that "whether any aspect of this action is time-barred is a question of fact that cannot be determined via this demurrer." The trial court considered and rejected the City's argument that this prior ruling should control its disposition of Intervenors' demurrer to the City's 6ACC:

> In July of 2006, assuming a three-year statute of limitations under *Marin Healthcare District*, there was an issue of fact whether the November 18, 2002 date of accrual alleged in the 5ACC constituted an adequate factual basis to permit tolling

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[26] When a complaint contains allegations that are fatal to a cause of action, a plaintiff cannot avoid those defects simply by filing an amended complaint that omits the problematic facts or pleads facts inconsistent with those alleged earlier. *Banis Restaurant Design, Inc. v. Borgata Serrano* (2005) 134 Cal.App.4th 1035, 1044; *Hendy v. Losse* (1991) 54 Cal.3d 723, 742-743; *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1109.

> of the date of accrual until November 2002 as alleged in the complaint. A November 2002 date of accrual would have been within three years of the filing of the 5ACC. Now, based on the holding of *Brandenburg*, it is clear that a one-year and not a three-year statute of limitations applies. Thus, even assuming for the purposes of argument that the date of accrual is November 2002 as alleged, under *Brandenburg*, the cross-complaint filed in July 2005 was too late and is barred by the statute of limitations. Thus, *Brandenburg* eliminates the factual controversy since the date of accrual under the facts taken in the light most favorable to the City is too late. (13 CT 3434:24-3435:11.)

In the face of this irreproachable analysis and its own pleading admissions related to the accrual of its claims, the City offers no hint as to how the matter could or would have ended differently had the trial court not granted Intervenors' demurrer. Not only has the City failed to show how or why the trial court was wrong on the facts or the law, the City has failed to meet its burden to show that there was a reasonable possibility the pleading defect could be cured by amendment.

5. Even If the City's Claims Filed on July 8, 2005, Were Treated As Timely, the Claims Against *New* and Indispensable Cross-Defendants Filed on May 10, 2007, Could Not Be Saved By the "Relation Back" Doctrine

Giving the City the benefit of every colorable basis on which to save its claims from dismissal, the trial court also examined whether the City's claims made against new cross-defendants for the first time on May 10, 2007, in its 6ACC, would "relate back" to its original complaint filed against Cross-Defendant SDCERS on July 8, 2005.

The trial court found that the City's 6ACC added as new parties: "all persons who currently claim, or who may claim, any right . . . to receive

benefits from SDCERS as a result of any person's employment with the City of San Diego," and that these parties who 'claim a right' are *new* to the action. (13 CT 3422:1-11.) However, since there were no fictitiously-named parties in the City's original cross-complaint, (1 CT 6:7-14, ¶ 25), who would constitute the pension beneficiaries and employees the City was attempting to bring into the action with its May 2007 6ACC, the trial court concluded that the traditional analysis under Code of Civil Procedure section 474 is not applicable:[27]

> Due process forbids 'relation back' where the amended complaint is against a *new* defendant – *i.e.*, one not named in the original complaint and not served as a 'doe.' The straightforward rule is that amendment after the statute of limitations has run will not be permitted where the result is the addition of a party who, up to the time of the proposed amendment, was neither a named nor a fictitiously designated party to the proceeding. (citations omitted.) . . . A cross-complaint against new parties cannot relate back to a point before the new parties were joined. (*Trindade v. Superior Court* (1973) 29 Cal.App.3d 857, 859-860). (13 CT 3432:22-3433:12.)

Moreover, the trial court found that, even if the court were to treat the filing of the City's 6ACC as a proper "Doe" amendment, the City could not properly avail itself of section 474 because "there can be no credible argument the City was not aware of the identity of its own employees and former employees for purposes of bringing them into this action." Under

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[27] The City named "Roes 1 through 50," claiming to be "ignorant of their true names and capacities," but asserting they "were negligently or otherwise responsible in some manner for the occurrences alleged in the cross-complaint." (1 CT 6:7-14.)

these facts, the trial court concluded, Code of Civil Procedure section 474 provides no relief even assuming it were applicable. (13 CT 3434:1-23.)

Accordingly, the trial court correctly concluded that the City's claims seeking to have its MP 1 and MP 2 pension legislation declared void are barred by the applicable one-year statute of limitations. This determination did not turn on the trial court's joinder analysis and order because the City's failure to join necessary parties before May 10, 2007, was irrelevant to the outcome. The City's *original* cross-complaint filed on July 8, 2005, was time-barred and cannot be saved.

B. The City Is Estopped By The *Corbett* Judgment From Seeking To Void MP 1 Benefits

The City's MP 1 claim was not only time-barred, it was also barred by the Judgment entered on May 17, 2000, in the *Corbett* Class Action litigation. The trial court concluded that (1) the City has not and cannot challenge the *Corbett* Judgment in this case;[28] and, (2) the City cannot go back and undo the MP 1 benefits which were replaced by the City's creation of benefits for all pension participants in the *Corbett* Judgment." (12 CT 3117:1-6.)

1. Standard of Review

The City contends that a *de novo* standard of review applies to the trial court's ruling on the effect of the *Corbett* Judgment because it involved

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[28] The City's verified discovery responses stated that the "City is not challenging *Corbett* in this action." (Ex. 779.58 and 1260.63.)

the interpretation of a settlement agreement and judgment. In support, the City cites *In Re Mission Ins. Co.* (1995) 41 Cal.App.4th 828, 835 [interpretation of a settlement agreement is reviewed de novo because "the parties (did) not rely on extrinsic evidence in construing the settlement agreement;" and *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 684 [interpretation of a contractual arbitration clause is reviewed de novo because "there was no factual dispute as to the language."]

However, de novo is *not* the standard of review applicable to the interpretation of a contract or a judgment when conflicting inferences arise from conflicting evidence rather than from uncontroverted evidence. In such a situation, the trial court's resolution is "binding." *Parsons v. Bristol Development Company* (1965) 62 Cal.2d 861, 866. "[W]here the interpretation of a contract turns on the credibility of conflicting extrinsic evidence, the trier of fact must determine the meaning of language in the contract," and the substantial evidence rule applies. *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 847. "If substantial evidence supports that interpretation, we will not overturn it on appeal." *Ibid.*

Here, the trial court made its findings on the meaning of the *Corbett* Settlement Agreement and Judgment on the basis of conflicting rather than uncontroverted evidence. Accordingly, this result is reviewed under the deferential "substantial evidence" standard of review.

2. The Trial Court Interpreted the Judgment and Ascertained the Parties' Intent At the Time of Settling *Corbett*

The phase one special defense related to the *Corbett* Judgment was this: "Whether the City is estopped as a matter of law from challenging the Manager's Proposal I ("MP 1") benefits by the prior Judgment in *Corbett*." (Exh. 919, 920). (12 CT 3114:10-13.) Intervenors argued that "MP 1 benefits" as such no longer existed after *Corbett* since the *Corbett* benefits constitute *new* retirement benefits for City employees, and any effort to have the former MP 1 benefits declared void would nullify the *Corbett* Judgment. The City countered that, consistent with its sworn discovery responses, it was not attempting a collateral attack on the *Corbett* Judgment; rather, the City argued that *Corbett* was settled for an "incremental increase" in MP 1 benefits *only*, permitting the court to declare the underlying MP 1 benefits void while keeping the *Corbett* "increment" intact and applying it to whatever benefits exist after the trial.

a. The Terms of the Judgment

Noting that the same rules apply to the interpretation of a judgment as to any other contract, the trial court began its analysis with the actual terms of the *Corbett* Judgment. (12 CT 3129:1-3.) The plaintiffs received certain increased retirement benefits or disability retirement benefits in exchange for giving up claims concerning the definition of compensation (Exh. 930.5:21-27); safety and general members of SDCERS who were employed on or after July 1, 2000, would have the option to accept a new

"retirement factor" or a 10% increase in benefits using the retirement factors in effect as of June 30, 2000, and would be required to pay an increased amount into the system to fund their share of the increased benefits (Exh. 930.10-930.11); those already retired, disabled, deferred or beneficiaries as of July 1, 2000, would receive a seven percent (7%) increase in their future benefits, plus a retroactive portion calculated on their then-existing benefits and paid in a lump sum (Exh. 930.8); legislative members received a 10% increase in benefits calculated using the benefits in effect on June 30, 2000 (Exh. 930.11); and, these 7% and 10% increases were also applied to DROP accounts before and after July 1, 2000 (Exh. 930.12). (12 CT 3129:1-28.)

b. The Intent of the Parties At the Time of Settling Corbett

Citing *Sawyer v. City of San Diego* (1956) 138 Cal.App.2d 652, the trial court observed that (1) no special rules of interpretation apply when a governmental entity is a party to a settlement agreement and resulting judgment, (2) the intent of the parties must be derived from the language of the agreement itself, and (3) it is the intent of the parties at the time of contracting that matters. (12 CT 3130:1-13.)

The City insisted that the trial court could set aside the underlying MP 1 benefits, leave the *Corbett* increment intact to be applied to *whatever benefits* existed after the trial, and thereby avoid nullification of the *Corbett* Judgment. However, the trial court found that the City's position was not

supported by the evidence of the intent of the parties from the *Corbett* Judgment itself which "clearly uses the benefits in effect as of June 30, 2000, as the basis for the computation of the 'new' *Corbett* benefits." (12 CT 3131:1-3.) Permitting the MP 1 benefits to be declared void (as the City sought) would nullify the *Corbett* Judgment because the settlement terms in *Corbett* would be wholly undermined if the 7% and 10% premiums did not hold their value. The trial court explained:

> The position of the City in this litigation is not supported by the evidence of the intent of the parties from the *Corbett* Judgment itself. The Judgment clearly uses the benefits in effect as of June 30, 2000, as the basis for the computation of the "new" *Corbett* benefits. If the City's interpretation of *Corbett* is correct, one would have to postulate that the parties agreed upon increases of 7% and 10% with no reference point. Taking the City's interpretation of *Corbett* to the extreme, the 7% and 10% increases would apply to zero since the underlying benefits are void. This clearly contradicts the evidence of the intention of the parties from the Judgment itself, as well as the City's own witnesses who testified the case settled for increased retirement benefits. (12 CT 3131:1-9.)

The trial court also found no greater merit in the City's alternative scenario that the *Corbett* "increments" could be applied to whatever benefits resulted from proceedings before the City Council after the court had declared the underlying MP 1 benefits void as the City urged. To embrace this position, the trial court said, would mean ignoring those portions of the *Corbett* Judgment which give current employees an option to take a new increased percentage "retirement factor," *i.e.*, 2.25% at age 55 *or* 2% at age 55 *plus* 10%. This option is stated in terms of an entirely new percentage and <u>not</u>

simply a fractional increase of a percentage, i.e., the option is to have a retirement calculation factor of 2.25% at age 55 not simply a .25% incremental increase in retirement factor.[29] (12 CT 3131:10-17.)

Moreover, the City's position ignored other aspects of the Judgment which, in addition to providing optional new retirement calculation factors for current employees, required all other benefits to be calculated using the pension benefits which were in effect as of June 30, 2000. For those already retired, this meant the benefits they were already receiving or would receive in the future, even if these benefit amounts had been calculated *under* the MP 1 pension benefit legislation. (12 CT 3131:17-3132:2.) Further, the City's proffered interpretation of the *Corbett* Judgment would mean that the parties on all sides had agreed to new *Corbett* benefits with no understanding of the cost to the City or the economic value to the class members associated with these settlement terms.[30] The trial court asked:

> [I]f the increases do not apply to and modify the benefits in existence as of June 30/July 1, 2000, what are they? What did the City give up and at what cost, and what did the employees receive? This conclusion is contradicted by Mr. Hopkins'

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[29] The City promotes its "incremental increase" theory by focusing on the 7% and 10% features of the *Corbett* Judgment, ignoring altogether the other key feature whereby a *new* retirement calculation factor became an option for each active employee. If an employee chose this option, the old MP 1 retirement calculation factors were *not* involved at all in the determination of this employee's retirement allowance.

[30] The City's expert actuary Joe Esuchanko testified that once *Corbett* went into effect, the full cost of the MP 1 benefits was incorporated into *Corbett* because the MP 1 benefits are part of the calculation. (24 RT 4334:5-9.)

> power point which refers to the litigation exposure of $743 million based on current benefits. The proposed $14.4 million annual cost of the settlement referred to the increase in costs of the new benefits over that of the old. These were the circumstances in existence in 2000. (12 CT 3132:3-12.)

Finally, the City also offered testimony to establish that the *Corbett* settlement did not purport to "ratify" the prior allegedly illegal MP 1 benefits because it neither entailed nor contemplated confirmation of the underlying benefits. (Testimony of Attorney David Hopkins, 20 RT 3376:18-26, 3377:26-3378:8 ["*Corbett* certainly wasn't a validation hearing for MP 1."]) However, no party had ever argued – and the trial court did *not* find – that the City was estopped from challenging *Corbett* because *Corbett* had "validated," "ratified," or "cured" the allegedly tainted MP 1 benefits. Accordingly, the trial court concluded:

> The most reasonable interpretation of the Judgment that accords with the wording of the Judgment itself and the facts in existence in May of 2000 is that new retirement benefits were created in *Corbett*. These benefits are not subject to challenge in this litigation charging illegality in the enactment of benefits in a prior MOU in 1996/1997. To the extent such benefits survived the enactment of the 1998 MOUs, they no longer existed after the *Corbett* Judgment. . . . (A)ny claims based on pre-*Corbett* benefits have been merged in the *Corbett* Judgment.[31] (*Tomaselli v. Transamerica Ins. Co.*

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[31] While the issue did not become outcome-determinative because of the undeniable effect of the *Corbett* Judgment, the trial court also correctly emphasized that, even before entry of the *Corbett* Judgment, the MP 1-related MOU's had expired and new MOU's were bargained and adopted without taint of any alleged violations of law. Thus, the repeated references in the *Corbett* Settlement Agreement and Judgment to "benefits in effect at the time," the trial court observed, would have meant the benefits enacted in *1998* to implement new MOU's negotiated and adopted that year *and not the MP-I-related MOU's, Resolutions and Ordinances*. (12 CT 3130:14-

> (1994) 25 Cal.App.4th 1766, 1770.) The benefits in effect at the time of, and underlying, the *Corbett* Judgment, including benefits funded under MP 1, cannot now be set aside because doing so would invalidate the *Corbett* Judgment. Accordingly, the City is estopped from pursuing claims which seek to invalidate such benefits. (Citations omitted.) Intervenors' special defense based on the *Corbett* Judgment is sustained. Benefits enacted by the *Corbett* Judgment cannot be nullified in this action." (12 CT 3132:20-3133:7.)

The City's description of this ruling as having involved an "erroneous weaving together of a patchwork of res judicata and ratification principles," with the trial court "misapprehending" the basic principles of "claim preclusion" and "issue preclusion" is just plain nonsense. (See AOB at 58-64.) Although the City disagrees with the trial court's conclusion, it does not deny that the trial court's interpretation of the Settlement Agreement and Judgment in *Corbett* is supported by substantial evidence. Moreover, even if a de novo standard of review applied instead, the trial court's decision is unassailably correct based on the terms of the Settlement Agreement and Judgment and the credible evidence of the parties' intent at the relevant time. The *Corbett* Judgment prevents the City from seeking to have its MP 1 pension legislation declared void and its MP 1 claim fails.

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27.) "It does not appear consistent with the MMBA to set aside new current agreements enacted without a § 1090 violation because the previous lapsed MOU's had this alleged problem." (12 CT 3133:21-28, fn. 2.)

C. The *Gleason* Judgment Prevents The City From Seeking To Void The MP 1 Or MP 2 Benefits Of The *Gleason* Class Members

The City's MP 1 and MP 2 claims were not only time-barred, they were also barred by the *Gleason* Judgment. The trial court concluded that Intervenors had carried their burden of proof to establish that the City was barred by the failure to file a compulsory cross-complaint in *Gleason I* from contesting MP 1 and MP 2 benefits as to all *Gleason I* class members (former employees, retirees and beneficiaries as of July 12, 2004.)

1. Standard of Review

The trial court's determination that the City's MP 1 and MP 2 claims against the *Gleason* Plaintiffs Class are barred by application of res judicata principles is reviewed de novo since it presents a question of law. (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 10.)

2. The Parties' Competing Contentions

On appeal, the City repeats its argument made below that the only cross-defendant on the claims asserted in its 5ACC is *SDCERS* and, since SDCERS and the City were co-defendants, not adversaries, in the *Gleason* case, there was no obligation for the City to raise its pension take-away claims against SDCERS in that case. Thus, the City reasons, the compulsory cross-claim aspect of res judicata has no applicability to its pension take-away claims being asserted *against SDCERS* because the retirees and former employees who *were* adverse to the City in the *Gleason I* case are *not* parties here.

On the other hand, Intervenors argued that the City's claims seeking to void the MP 1 and MP 2 pension benefit legislation could not proceed in the absence of the individuals whose vested pension benefits were at risk, and that the City's claims against SDCERS as the sole cross-defendant failed to present a justiciable controversy – citing the California Supreme Court's decision in *Salazar v. Eastin* (1995) 9 Cal.4th 836, 860 [when persons who are most likely to challenge a request for declaratory relief are not before the court, any opinion rendered is advisory and not within the court's function or jurisdiction.] Thus, Intervenors argued, if the trial court ordered the joinder of the absent but necessary parties in order to cure the lack of a justiciable controversy, the doctrine of res judicata would be triggered and the City's claims against all members of the *Gleason I* class would be barred.

3. The Trial Court Correctly Concluded That Res Judicata Principles Should Be Applied As If The Necessary Parties Had Been Joined

The trial court ultimately denied the City the opportunity it sought to create this "Catch 22" scenario. Concluding that the City cannot, on the one hand, contend the individuals are not in the case and the defendant is SDCERS to avoid the compulsory cross-complaint bar – while on the other hand, seek relief which consists of voiding those very individuals' retirement benefits – the trial court determined that the individuals whose benefits are at risk should be joined as parties to this action, if a viable claim could be stated against them. Once they appear, the trial court held,

the compulsory cross-complaint issue arises from the prior *Gleason I* litigation. (12 CT 3143:14-21.)[32]

4. The City's Claims Were Compulsory Cross-Claims in *Gleason*

Thus, the ultimate question became: Were the City's claims "compulsory cross-claims" in the *Gleason I* case or not? The trial court held they were.

a. A Related Cause of Action Must Be Raised And Litigated Or Be Waived

First, the statutory rules of procedure in the matter are clear. Code of Civil Procedure section 426.30, subd. (a) requires a party against whom a complaint is filed and served to assert in a cross-complaint any *related* cause of action existing against the plaintiff at the time of filing the answer or be precluded from asserting the related cause of action in any other action against the plaintiff. Section 426.10 defines a "related" cause of action as one which "arises out of the same transaction, occurrence, or series of transactions or occurrences." The bar arising from the failure to assert a compulsory cross-complaint applies to a *related* cause of action regardless of whether the cause of action was actually litigated or decided in the prior action. (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1156-

[32] The trial court noted that the Stipulation filed by SDCERS and the City on the eve of trial, (11 CT 2852), "further recognizes that the 5ACC in reality seeks a remedy against the employees and retirees." (12 CT 3145:11-13.)

1157.) (12 CT 3143:12-3144:2.) This is the "should have been raised" form of claim preclusion.

b. The City's Claims Here Depend On Whether Or Not MP 1 and MP 2 Were "Single, Integrated Transactions

Next, the trial court evaluated whether or not the City's claims here were "related" to the claims made by the *Gleason* plaintiffs class, and concluded that they were. The City's 5ACC alleged that "MP 1 and MP 2 and all benefits granted thereunder" are illegal and void because certain SDCERS Board Members allegedly violated Government Code section 1090 and debt limit laws when approving these funding agreements at the City's urging. (4 CT 958, ¶ 67 and 959, ¶ 70.)

The MP 1 and MP 2 *funding* agreements, however, are not the target of the City's claims as they have been terminated by entry of the *Gleason* Judgment. (See II, Statement of Facts, Section F, *supra*, at 26.) Instead, the City's claims target the MOU's and the pension benefit legislation adopted by the City Council. Thus, in order to *reach* the benefits, the City's claims are premised on the allegation that MP 1 and MP 2 constituted "single integrated transactions" whereby the benefits were the *quid pro quo* for under funding SDCERS, rendering the MP 1 and MP 2 pension legislation void *ab initio* under Government Code section 1092. (12 CT 3144:9-17.)

In other words, the central premise of the City's argument to reach the benefits is that the vote of the City Council to increase benefits was part of the same transaction as the vote of the Pension Board to allow the under

funding. (See 5ACC, ¶¶ 34 and 42.). If they were not part of the same transaction, then the vote by the City Council to increase benefits would not be subject to the remedies under Government Code section 1092 since the allegations of financially interested decision makers in the 5ACC all relate to the SDCERS Board and not the City Council. (12 CT 3143:18-3144:24.)

c. The *Gleason* Claims Challenged the Validity of MP 1 and MP 2

The *Gleason I* case challenged the alleged "under funding" of SDCERS since 1996 by means of MP 1 and MP 2, on the ground that these "under funding" agreements had rendered the pension trust fund actuarially unsound thereby impairing the plaintiffs' vested contractual rights as plan participants. (Exh. 961.) However, the City did not respond to the *Gleason* plaintiffs' claims by challenging the legality or validity of the pension benefits they were receiving as part of the MP 1 and MP 2 "transactions." Instead, the City elected not to challenge these benefits and filed no cross-complaint. By affirmative defense, the City asserted that plaintiffs' class had received all payments and benefits to which its members were entitled and had not sustained any damage or harm cognizable under California law. (Exh. 1434.4:4-7.) (12 CT 3145:2-7.)

d. The City's Theory for Reaching the Pension Benefits Makes Its Claims "Related" to the MP 1 and MP 2 Transactions At Issue in *Gleason*

The trial court concluded that the City's claims to invalidate benefits arise out of the same transactions put at issue by *Gleason I* and were,

therefore, compulsory cross-claims in *Gleason I*. (12 CT 3144:28-3145:2.) The City's failure to assert a cross-complaint against the plaintiffs in *Gleason I* challenging the benefits bars litigation of such claims against those parties here. *Gleason* is res judicata as to those *Abdelnour* plaintiffs and all other participants who were members of the *Gleason I* plaintiffs' class. (12 CT 3145:8-10.) The trial court explained:

> Because the City reaches the benefits as a legal matter only through its allegations that they each constitute a "single transaction" with the MP 1 and MP 2 funding agreements and are, therefore, void *ab initio*, and/or that the benefits as a whole violate debt liability limits, the City is bound by the principles of res judicata and the claims against the *Gleason I* class members were merged in the settlement and Judgment and are conclusive as to this action. (citations omitted.) If the Court were to order the joining of the members of the *Gleason I* class as necessary parties to this action, it would be an idle act, as the claims against them would be subject to dismissal as set forth herein. (Code Civ. Proc., § 1061)." (12 CT 3145:13-3146:2.)

5. The City Does Not Challenge The Correctness of The Trial Court's Ruling That Its Claims Would Be Barred If Joinder Were Properly Ordered

On appeal, the City asserts the "utter impossibility of properly applying claim or issue preclusion to the City in this case based on the *Gleason* settlement," and describes the trial court's "error" as resulting from the same "misreading and misapplication of res judicata principles" as occurred when the trial court determined the effect of the *Corbett* Judgment on the City's right to challenge the MP 1 benefits. (AOB at 76-77.)

The City's argument covers the map: (1) who sued whom over what in the *Gleason* consolidated cases (not in dispute); (2) who was a party to

what claims and who was adverse to whom (not in dispute); (3) who was *not* a party at all – the City employee Unions (not in dispute); and (4) who released whom and what was the scope of the release (not in dispute). (AOB at 77-79, 83.) The City also quotes the testimony of outside counsel, who defended the City in the *Gleason* consolidated action, confirming that the City never challenged the MP 1 and MP 2 benefits during the *Gleason* case – a matter also not in dispute. (AOB at 79, fn. 29.)

With these distractions out of the way, the City finally gets to the point. The City acknowledges that the trial court found its pension take-away claims related to MP 1 and MP 2 were barred by *Gleason* under the "should have been raised" bar/merger aspect of claim preclusion "because the City asserts that underfunding and benefit increases were a *quid pro quo* and inextricably linked in MP 1 and MP 2, and, thus, the City was required to assert its illegality of benefits claim as a compulsory cross-claim in response to plaintiffs' underfunding claims in *Gleason I.* (12 CT 3117:17-3118:2; 12 CT 3114:27-3145:2.)." (AOB at 80.)

The City does not disagree that its claims would be barred by the *Gleason* Judgment if the absent *Gleason I* class members *were* parties to this case. The City simply says the trial court's conclusion was wrong because the City and SDCERS were co-defendants in *Gleason I* (not adversaries) whereas here SDCERS is the "target of the City's illegal benefit claims." (AOB at 80-82.) The City characterizes the trial court's

"error" as having been its "use of an improper party joinder analysis to bootstrap a claim preclusion bar based upon absent parties." (AOB at 82.)

In other words, the City's objection to the trial court's ruling on the effect of the *Gleason* Judgment is *not* based on any disagreement with the conclusion that its claims were, in fact, compulsory cross-claims in *Gleason*. Nor does the City disagree with the corollary that *Gleason* does bar its claims in this case *if* the retirees, beneficiaries and former employees who were *Gleason* class members *are made parties*. The City simply argues that this result could and *should* be prevented by keeping these absent parties out of the case. (AOB at 79.)

Thus, the City has conceded for purposes of its appeal that, if the trial court's joinder analysis was correct, then its conclusion with regard to the preclusive effect of the *Gleason* case must also stand.

D. Though Ultimately Not Outcome Determinative, The Trial Court Meticulously Applied The Law In Finding That Absent Pension Plan Participants Were Necessary Parties

Since the trial court correctly determined that the City's MP 1 and MP 2 claims are time-barred *despite* the City's nearly two-year delay in joining necessary parties, this Court need not reach the City's appeal on the issue of "necessary parties." Intervenors nevertheless discuss the correctness of the trial court's joinder analysis and rulings.

1. Standard of Review

The trial court's determination that the nature of the interest which absent pension plan participants have in their pension benefits is such that

they are necessary parties on the City's claims to have those benefits forfeited, within the meaning of Code of Civil Procedure section 389(a), involves a question of law and is reviewed de novo. (*People ex rel. Lungren v. Community Redevelopment Agency* (1997) 56 Cal.App.4th 868, 875.) Its determination that these absent parties are indispensable within the meaning of section 389(b) is reviewed for an abuse of discretion. (*County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 25.)

2. The Trial Court's Rulings Came In Two Stages

a. Special Defense to the City's 5ACC Sustained

A special defense to the City's 5ACC was: "Whether the City's 5ACC presents an actual justiciable controversy between the City and necessary parties." (10 CT 2420; 12 CT 3114:14-15.) When the trial began on October 30, 2006, SDCERS was the *only* cross-defendant remaining on the City's claims. By stipulation before the start of trial, SDCERS agreed to abandon any further active role in opposing the City's pension take-away claims, and "to be bound by all orders of the Court, including final judgment, as to the legality of pension benefits at issue." (11 CT 2852.) The *only* pension plan participants who had *ever* been named as cross-defendants on the City's claims were the six former SDCERS Board Members alleged to have violated Government Code section 1090, whom the City dismissed from the case on June 14, 2006. (7 CT 1619.)

Intervenors argued that the absence of necessary parties undermined the justiciability of the City's claims to have its own pension benefit

legislation declared void – citing *City and County of San Francisco v. Boyd* (1943) 22 Cal.2d 685, 694 [An action not founded upon an actual controversy *between the parties to it*, but which is brought for the purpose of securing a determination of a point of law for the gratification or the curiosity of the litigants, or the sole object of which is *to settle the rights of third persons who are not parties*, is collusive and will not be entertained], and *Salazar v. Eastin* (1995) 9 Cal.4th 836, 860 [When persons who are most likely to challenge a request for declaratory relief are not before the court, any opinion rendered is advisory and not within the court's function or jurisdiction."]

As the trial court noted, the City's argument that the problem created by its failure to join the employees and retirees in the litigation could be cured "by tailoring the requested relief so it only affects the litigants before the Court," related to application of Code of Civil Procedure section 389(b) – an analysis the court would not reach if the absent individuals are known and subject to service of process. (12 CT 3139:8-13.) In the alternative, the City urged that the trial court proceed in their absence, declare the individual benefits void and give those adversely affected an opportunity to contest the result. The trial court correctly rejected this approach:

> Under basic principles of due process, the notice and opportunity to be heard must occur before the definitive decision by the Court, and not after it is made. (12 CT 3139:17-18.)

The trial court held that necessary parties within the meaning of Code of Civil Procedure section 389(a)(2) were not before the court and were required to be joined and served in order for the City to proceed with its cross-complaint.[33] (12 CT 3134-3140; 3154).

b. Demurrer Sustained to the City's 6ACC

When ruling on Intervenors' demurrer to the City's 6ACC filed on May 10, 2007, the trial court determined that the City's claims against *new* parties were untimely and did not relate back to the City's original complaint *if* the City's original complaint filed more than one-year after its claims accrued were, for the sake of argument, deemed to be timely. (13 CT 3432:20-3435:23.) Only in this *hypothetical* context did the trial court even reach the analysis required by Code of Civil Procedure section 389(b). In a proper exercise of its discretion under Code of Civil Procedure section 389(b), guided by the leading case of *Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686, 692-693, the trial court concluded that the City's claims against SDCERS, as the sole cross-

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[33] The trial court also held that, in view of its rulings related to the effect of the *Corbett* and *Gleason* Judgments and in light of the City's verified discovery responses conceding that it was not challenging the new MP 2 retirement calculation factor of 2.5% at age 55 "on a going forward basis" (Exh. 779.68, No. 434 and 1260.73, No. 434), "it appears that many of the remaining viable claims under the City's theories would be against the general members who retired between July of 2002 and July of 2005 . . . and given that many of these individuals would have been in the *Gleason I* class (*i.e.* retirees up to July 12, 2004), logic dictates there is a definable group of a reduced number of individuals who would be affected by such a ruling." (12 CT 3149:27-3150:23.)

defendant, could not proceed in the absence of these indispensable parties. (13 CT 3433:13-27; 3436:6-18.)

3. The City Does Not Challenge The Trial Court's Findings Regarding Who Was Before the Court and Who Was *Not*

The City does not challenge the trial court's following findings of fact, nor argue that these findings are not supported by substantial evidence:

> ▸ As of October 26, 2006, there were 17,638 beneficiaries of SDCERS, comprised of 5,327 retirees (including active DROP participants), 1,068 other beneficiaries receiving benefits, 8,997 active employees, and 1,768 former employees who have not yet retired. (Exh. 1437.) (12 CT 3134:13-19.)
>
> ▸ Three of the five City employee unions and 194 current and former employees (the *Abdelnour* plaintiffs) are before the Court as intervenors.[34] The Deputy City Attorneys have their own union and have not appeared in the action. The San Diego Police Officer's Association has not intervened in this action and has filed a separate action in federal court, with a Notice of Divestiture having been filed in this action on behalf of over 1,500 individuals objecting to a determination of their rights in this action in their absence. (Ex. 1438.) (12 CT 3134:13-3135:2.)
>
> ▸ The three unions represent only current employees, not retirees, and not all current employees are union members. (12 CT 3134:20-26.)
>
> ▸ Legislators and a couple hundred supervisory City employees are not represented by the unions and are not in the case. (*Id.*)
>
> ▸ "[A]t best, even assuming for purposes of argument, that all current employees of the MEA, Locals 127 and 145 are before the Court, there are over 4,000 individuals affected by this case who are not before the Court and have not been given legal notice their

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[34] The number of *Abdelnour* plaintiffs was substantially reduced following phase one, and before the City filed its 6ACC. One hundred thirty-seven (137) *Abdelnour* plaintiffs filed voluntary dismissals of their claims on March 15, 2007. (12 CT 3156.)

individual retirement benefits are at risk in this litigation." (12 CT 3135:3-14.)

▸ By entering into a settlement agreement with the City that it would be bound by any decision of the trial court on the City's challenge to benefits, SDCERS played no role in the trial, cannot be said to be representing absent participants and beneficiaries, and clearly is not litigating to protect the benefits of absent parties. (12 CT 3134:4-12.)

4. The Trial Court Determined That the Absent Persons Were Necessary Parties Under C. C. P. § 389(a)(2)

The trial court applied the statutory standard set forth in Code of Civil Procedure section 389(a) to determine whether the persons admittedly absent from the case are necessary parties based on the nature of the City's claims and their interests:

> [A person] shall be joined as a party to the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring . . . inconsistent obligations.

First, the trial court found that the identities and locations of SDCERS participants and beneficiaries are known as a matter of SDCERS' records, and that all are subject to notice, having been notified in other actions involving their benefits (*Corbett* and *Gleason*) and been given the opportunity to participate.[35] (12 CT 3135:22-3136:3.)

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[35] In addition to the notices mailed in *Corbett,* (Exh. 1128), and *Gleason*, (Exh. 789 & 790), shortly before trial began on the City's pension take-away claims, notices were mailed to **18,006** SDCERS pension plan participants in the *McGuigan v. City of San Diego* case, advising of a settlement designed to provide better funding for the City's pension plan in

Thus, the trial court said, "the threshold determination is whether the absent parties have an interest in the subject of the action." (12 CT 3136:4-5.) The trial court correctly observed that the interest a current or former employee or retiree (or beneficiary) has in a particular retirement benefit is an individual interest, which is constitutionally-protected, vests upon the acceptance of employment, and is earned as the employee performs services. (12 CT 3136:6-13.) Pension benefits improved by collective bargaining, once created, inure to individual employees and cannot be bargained away or waived by the Unions representing them. [*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-53; *Gibson v. City of San Diego* (1945) 25 Cal.2d 930, 937; *Phillips v. State Personnel Board* (1986) 184 Cal.App.3d 651, 660, disapproved on other grounds in *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1123, fn. 8.)] (12 CT 3137:17-25.) Thus, the trial court found that "City employees, retirees and beneficiaries have individual due process interests in protecting their pension benefit rights." (12 CT 3137:12-26).

Because these absent persons have interests relating to the subject of the action within the meaning of section 389(a)(2), the trial court concluded that it was duty-bound to order them to be made parties as long as the City seeks relief which may impair their pension benefit rights. (*Tuller v. Superior Court* (1932) 215 Cal. 352, 355 [Court's nondiscretionary duty

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furtherance of the plan participants' vested right to an actuarially sound plan. (Exh. 1468, 1439 and 1440.)

arises once Court identifies an absent necessary party.]) (12 CT 3134:13-3137:2.) Under any standard of review, this finding by the trial court is unassailable.

5. The City's Central Argument Under Section 389(a)(1) Is Founded On A Sham

The City sidesteps the trial court's conclusion under section 389(a)(2), focusing instead on section 389(a)(1) to argue that "complete relief *can* be accorded among those already parties." (AOB at 41 and 44.)

Each of the City's arguments as to why complete relief *can* be accorded in the absence of retirees, beneficiaries and employees, is either flawed or relies on the City's deception regarding the remedy sought.

a. C. C. P. § 369 Addresses the Rights of Certain Party Plaintiffs to Sue in the Absence of Other Plaintiffs

On the theory that employees, retirees and beneficiaries are third party beneficiaries to the "MP 1 and MP 2 contracts and legislative actions," the City cites Code of Civil Procedure section 369, and cases decided under it, in support of its argument. (AOB at 40-41.)

However, neither the code section nor the cases cited stand for the proposition that third party beneficiaries to a contract are not necessary party *defendants*. Instead, section 369 lists persons who "*may sue* without joining as parties the persons for whose benefit the action is prosecuted." *See Ragan v. Sirigo* (1958) 160 Cal.App.2d 832, 834 (right of one owner of a patent to sue for royalties in the absence of patent co-owner); *Chase v. Van Camp Sea Food Co.* (1939) 109 Cal.App. 38, 45-46 (right of one party

to a contract to sue for breach without joining others who may have an interest in the contract as against the plaintiff); *In re Marriage of Smith & Maescher* (1993) 21 Cal.App.4th 100, 105-108 (right of mother to sue for father's breach of separation agreement to pay for son's college without joining son). Each of these cases addresses, by reference to a statute expressly designed for absent plaintiffs, whether an action may proceed in the absence of a third party beneficiary *plaintiff.* In contrast, the issue here is whether the trial court has properly required the joinder of third party beneficiaries on claims seeking to invalidate vested property interests of absent potential *cross-defendants.*

In citing section 369 in support of its argument, the City also ignores the distinction between its cross-complaint seeking to take vested pension benefits away from the absent third party beneficiaries, and Intervenors' complaints in intervention seeking to enforce promises contained in collective bargaining agreements. The fact that Intervenors' complaints in intervention remain pending before the trial court is irrelevant on this appeal from a judgment dismissing the City's cross-complaint seeking relief *against,* not *on behalf of* third party beneficiaries.

b. The City's "Critical Mass" Theory Is Not Supported By Law or Logic

The City's argument that a "critical mass of interested parties" is sufficient to proceed in the absence of persons whose individual interests are threatened is unsupported. The City cites *People ex rel. Lungren v.*

Community Redevelopment Agency (1997) 56 Cal.App.4th 868, and *Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092.

Neither case contains the phrase "critical mass" nor stands for the proposition that necessary parties need not be joined under Code of Civil Procedure section 389 if enough other parties are present with an interest in defending the action. *Such a theory would enable a litigant to hand-pick its opponents.*

While it is true that the courts have cautioned against converting section 389(b) from a discretionary power or rule of fairness into an arbitrary and burdensome requirement of joinder which would thwart justice [*Deltakeeper, supra*, 94 Cal.App.4th at 1105; *Countrywide Home Loans, Inc. v. Superior Court* (1999) 69 Cal.App.4th 785, 793, quoting *Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 521], no court has authorized the use of section 389 as the City urges in this action to *exclude* absent parties whose individual, constitutionally-protected, and immediate economic interests are at stake – parties who were always known to the City, subject to service of process, and against whom timely claims *could* have been made.[36]

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[36] In *Countrywide*, unlike this case, the court faced what it called the "relatively rare" circumstance when the "complete relief" prong under Code of Civil Procedure section 389, subd. (a) was argued as the *sole* basis for finding an absentee to be a necessary party. 69 Cal.App.4th at 794. *Countrywide* decided that complete relief could be accorded among those already parties because damages, if any, could be ascertained and judgment rendered without the absent parties, and, since these absent parties had either specifically assigned their rights to Countrywide or were alleged to

c. The City's True Intent Is To Impair Or Impede The Ability of Absent Persons To Protect Their Interests In Their Vested Pension Benefits

The City's suggestion that the relief it requests will somehow avoid harm to the absent pension plan participants because "the remedy sought here is one that *confines* the relief to the broad question of the unlawfulness" of City officials' actions, (AOB at 41-43; emphasis added), is a sham.

At trial, the City tried to disguise the remedy it sought in the absence of those whose economic interests were threatened, initially by asserting that "this (case) is not about taking away benefits, because an unfunded benefit does not exist" (10 RT 969:12-15; 973:28-974:2.), and then by proclaiming that the absent parties would not be bound by any judgment entered in the case and, thus, a disposition of the case in their absence would not impair or impede their ability to protect their interests.[37]

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be joint tortfeasors, no harm to existing or nonjoined parties and little risk of inconsistent future obligations would result. *Id.* at 794-798. Here, the absent pension plan participants have not assigned their interests in their pension benefits to their unions; there is no allegation that they violated Government Code section 1090 or any other statute; and damages in the form of "disgorged" pension benefits cannot be ascertained.

[37] In arguing a C. C. P. § 631.8 motion at the conclusion of Intervenors' evidence, the City asserted that a disposition of the City's claims in the absence of pension plan participants would not as a practical matter impair or impede their ability to protect their interests because: "The absent individuals will not be bound by the judgment. They will not be bound by the judgment. It's just that simple. SDCERS will be bound by it." (15 RT 2109:16-19.)

On appeal, however, the City shamelessly *admits* its objective in seeking a declaratory judgment in the absence of the persons whose pension benefits are threatened:

> Not only can complete relief be afforded among those already parties through a declaration that MP 1 and MP 2 are void for violation of conflict of interest and debt limit laws, but that declaration would eliminate the prospect that the existing parties would be subject to inconsistent obligations. *Upon determination that MP 1 and MP 2 are void, the City can assert that binding adjudication under collateral estoppel in subsequent litigation.* (AOB at 54, fn. 13, emphasis added.)

Thus, the City's true objective in this litigation is precisely why the trial court ruled as it did:

> While the City argues . . . that they do not seek a judgment against individual employees, they are seeking a ruling terminating individuals vested pension rights. The City in other sections of its argument continuously reminds the Court of the automatic disgorgement provisions under § 1090. . . . Stated in practical terms, if the City is not seeking to take away individuals' benefits, there is no benefit to the litigation as the pension obligations would remain. (12 CT 3138:17-25.)

Thus, the trial court's conclusion that the absent parties were necessary and must be joined if the City wished to proceed on its limited, remaining MP 2 claim is also unassailable.

d. Complete Relief Could Not Be Afforded Among Existing Parties In Any Event

The City's preferred scenario, of course, was to achieve a declaratory judgment in the absence of the persons adversely affected by it, and then invoke the doctrine of collateral estoppel to defeat the claims of individual

retirees, beneficiaries and employees which would undoubtedly follow. The trial court foresaw this outcome:

> In this case, the requested relief is broad and seeks outright voiding of the benefits at issue. It would be incongruous if the Court were to hold that benefits are void, but not as to those who were not served in the case. There would certainly be a risk of inconsistent rulings if the non-joined then litigated the case repeatedly as the City and SDCERS attempt to make sense of an order which declared benefits void, but only applied it to certain classes of unnamed individuals who are union members. (12 CT 3139:19-24.)

In reaching its conclusion that joinder of necessary parties was required under Code of Civil Procedure section 389, the trial court cited *Silver v. Los Angeles County Metropolitan Transportation Authority* (2000) 79 Cal.App.4th 338. (12 CT 3140:1-9.) *Silver* held that employees were indispensable parties in an action seeking rescission of a public agency's payment of the employees' share of Social Security contributions on the ground that such payment was an illegal gift of public funds.

In a footnote, the City dismisses the applicability of *Silver*, arguing that, here, "the City seeks a declaration as to the invalidity of governmental actions, not a remedy against any individual employee or retiree for a return of monies paid," and thus the absent plan participants are adequately represented. (AOB at 53, fn. 11) First, of course, is the fact that the City *does* seek a remedy which would impair or impede the ability of absent retirees, beneficiaries or employees to protect their individual pension interests. But the court in *Silver* flatly rejected the precise argument the City makes, noting that "a determination that the payments were illegal

would not achieve a complete adjudication of the dispute, and would result in a multiplicity of litigation; accordingly, the employees were indispensable parties in whose absence the issues could not be litigated. *Id.*at 350.

Moreover, *People ex rel. Lungren v. Community Redevelopment Agency* (1997) 56 Cal.App.4th 868, 876-77, confirmed that Code of Civil Procedure section 389(a)(1) is implicated in a case "in which a party not before the court owns some unspecified interest in property which precludes a final determination of the interests held in that property by those who do appear as parties."

Here, the absent pension plan participants have individual interests and property rights which would give rise to *individual* cross-claims if they were joined as parties by the City, seeking enforce the constitutional protection their pensions enjoy, to invoke the doctrines of estoppel and detrimental reliance, and ultimately to seek damages against the City on one or more theories as a result of the City's having deducted thousands of dollars of pension contributions from their bi-weekly wages in exchange for the pension promises the City made.

Thus, a final determination of the City's cross-complaint could not, under any rationale analysis, be achieved in the absence of these necessary parties. The presence of the Intervenor Unions does not establish *in personam* jurisdiction over the absent parties. A judgment *in personam*

may not be entered against one not a party to the action, and such a judgment is void. (*Fazzi v. Peters* (1968) 68 Cal.2d 590, 594.)

6. The City Erroneously Argues that the *Mere Presence* of Some Parties Makes Up for The Absence of Necessary Parties

Next, the City contends that a disposition of its pension take-away claims in the absence of the persons to whom those benefits belong, will not impair or impede their ability to protect their interest in these benefits because they are "well-represented" by Intervenor Unions, the *Abdelnour* plaintiffs group, and even by SDCERS. Again, the City's argument utterly disregards the trial court's factual findings.[38]

a. SDCERS Is Not Representing Any Absent Party

The City argues that "[t]here is no suggestion that SDCERS would not participate in Phase III of the trial relating to the existence of a [Gov. Code] Section 1090 violation." (AOB at 44, fn. 6.) Yet this flatly contradicts the stipulation between SDCERS and the City establishing that SDCERS would no longer actively defend against the City's pension take-away claims, agreeing instead "to be bound by all orders of the Court, including final judgment, as to the legality of pension benefits at issue." (11 CT 2852-2853.) As the trial court held after phase one: "By settling the

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[38] The City's argument that the absent parties are "well-represented" is essentially a factual argument. Because the City concedes the correctness of the trial court's factual findings regarding who was before the court, who was not, and who could or did represent whom, see section 2, *supra*, this Court is bound to accept those facts as found. Even if the City had contested these factual findings, they are supported by substantial evidence.

claim in this fashion . . . SDCERS cannot be said to be representing the absent parties as argued by the City in their draft of a Proposed Statement of Decision at pages 36-37. SDCERS played no role in this portion of the dispute and clearly is not representing absent parties by litigating to protect benefits." (12 CT 3134: 8-12.)

b. The Remaining Abdelnour Plaintiffs "Represent" No One But Themselves

The City also asserts that "the 194 *Abdelnour* Plaintiffs represent individual non-union employees and retirees." (AOB at 44, fn. 6) Yet, the *Abdelnour* Plaintiffs are just that – plaintiffs on their own complaint. The City's 5ACC did not name *any* of the *Abdelnour* plaintiffs as cross-defendants on its claims, nor did it state *any* claims against them. The City's 5ACC was not a defendants' class action and it did not name *any* cross-defendant other than SDCERS. (Exh. 796; 4 CT 945.)

Thus, the City's assertion that a relative handful of individual employees and retirees "represent" absent parties is a frivolous argument on its face.

c. The Intervenor Unions Do Not Represent *All* Employees And Beneficiaries

The City's assertion that Intervenor Unions "represent *all* the employees and beneficiaries," (AOB at 43; emphasis in original), is contrary to the undisputed evidence and the trial court's findings, *i.e.*, that Intervenor Unions, at most, only represent their own current employees for collective bargaining purposes. They do not represent beneficiaries of

employees, retirees, former employees, employees represented by other unions (*viz.*, DCAA, POA), or unrepresented employees for collective bargaining or other purposes. (12 CT 3134:20-3135:14.)

The City argues that this finding is inconsistent with the trial court's asserted finding that the "Unions were capable of representing the employees and all system beneficiaries in approving MP 1 and MP 2." (AOB at 46, fn. 7.) The citation to the record on which the City relies, however, reveals that this is *not* what the trial court found. The City cites two sections of the trial court's Statement of Decision which described the meet and confer process between the City and its labor unions in 2002, (12 CT 3125:1-13 and 3126:14-23), and a third section wherein the trial court wrote: "While employees in bargaining units represented by Intervenors are bound by the terms of the MOU's negotiated by their unions, the unions nonetheless cannot bargain away nor waive the employees' individual constitutional rights. (citation omitted.)" (12 CT 3137:17-20.) Thus, contrary to the City's assertion, the trial court did not find, nor did the evidence show, that "the Unions were capable of representing the employees and all system beneficiaries in approving MP 1 and MP 2."

Substantial evidence supports the trial court's finding that the Intervenor Unions do *not* represent *all* the employees and beneficiaries, and the City makes no credible showing to the contrary.

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d. Even If Employees Represented By Intervenor Unions Were Deemed To Be Before The Court, Thousands Of Others Are *Not*

The trial court concluded that, in view of the nature of the individual interests being threatened with impairment by the City's claims, the appearance by the unions as plaintiffs in intervention was not the legal equivalent of an appearance by their individual members as parties. (12 CT 3137: 27-28.) However, the trial court continued, even if it were assumed for the sake of argument that certain individual current employees whose pension benefits are threatened by the City's claims, were deemed to be before the court through their Intervenor Unions, "there are over 4,000 individuals affected by this case who are not before this Court and have not been given legal notice that their individual retirement benefits are at risk in this litigation." (12 CT 3135:3-14.)

7. The Intervenor Unions Are Not Legally Adequate Substitutes For Absent Parties Whose Individual Pension Rights Are Threatened

Because the City raises no credible challenge to the trial court's findings and conclusion that thousands of retirees, beneficiaries and employees were *not* before the trial court, this Court need not address the irrelevant argument the City makes by reference to representational standing cases.

However, the trial court correctly rejected this argument below because (1) the fact that unions have the capacity to sue or be sued and have standing to enforce collective bargaining agreements does not satisfy the

joinder analysis required by Code of Civil Procedure section 389; (2) unions are separate legal entities from their members who are neither principals nor agents in any true sense;[39] and (3) they are inadequate representatives for all union members who may be adverse to one another due to the nature of the relief the City seeks.[40] (12 CT 3137:12-3139:7.)

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[39] The City argues that the trial court's discussion of agency cases does not "overcome principles of representational standing." (AOB at 48-49.) This argument is unintelligible. The notion that Intervenor Unions' associational standing is sufficient to *bind* City employees to an outcome that invalidates their retirement benefits must necessarily derive from some theory whereby Union members and non-members, and their beneficiaries, have delegated authority to the Unions and made them their agents for purposes of defending their individual retirement interests. The trial court correctly found that individual union members are not principals of union officers, agents, and employees so as to be bound personally by their acts (*Marshall v. Int'l. Longshoremen's Union* (1962) 57 Cal.2d 781, 784); that unions and their members are distinct, with the union representing group, rather than personal or private interests of the members (*DeMille v. American Fed. of Radio Artists* (1947) 31 Cal.2d 139, 149); that members do not consent to incur obligations of the association by reason of joining or becoming members; and that establishing personal liability for association obligations, in any event, would require service of process on the individual in his or her individual capacity. (*Barr v. United MethodistChurch* (1979) 90 Cal.App.3d 259, 272-73, *cert. denied*, 444 U.S. 973, *reh. denied*, 444 U.S. 1049).

[40] The trial court found that the Intervenor Unions are "inadequate representatives" because the City does not seek to set aside the "paid-for MP 2 benefits on a going forward basis," thereby creating the potential for some union members to be adverse to others. "The unions while representing the collective bargaining agreement cannot adequately represent members who face different effects because of the tactical choices of the City in this litigation." (12 CT 3138:27-3139:7.) The City argues that this is wrong because it *does* seek to set aside *all* MP 1 and MP 2 benefits. (AOB at 49.) This assertion directly contradicts the City's verified discovery responses, (Exh. 779.68, No. 434 and 1260.73, No. 434), on which the trial court properly relied.

a. The Fact That A Union Has Standing To Sue Or Be Sued Does Not Make It A Legally Adequate Substitute for the Real Parties in Interest on the City's Claims

The trial court correctly found that Intervenor Unions were participating in this action specifically to enforce their collective bargaining agreements with the City pursuant to California's Labor Code section 1126. (12 CT 3137:13-17.)

The City relies on *California School Employees Assn. v. Willits Unified School Dist.* (1966) 243 Cal.App.2d 776, and *Bhd. Of Teamsters v. Unemployment Ins. Appeals Bd.* (1987) 190 Cal.App.3d 1515, 1523, as well as a dizzying array of other union standing cases which involve unions' standing to sue *on behalf* of their members as *plaintiffs*.[41] For example, in

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[41] *San Bernardino Public Employees Ass'n. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1224, involved an action brought by a union over changes to its members' annual leave and longevity pay benefits which the court held were not vested retirement rights but employment rights earned on a year-to-year basis which can be bargained away. *In re Retirement Cases* (2003) 110 Cal.App.4th 426, involved the application of the California Supreme Court's *Ventura County* decision in determining whether various types of employment benefits should be included in calculating retirement benefits and whether *Ventura County* was retroactive. In the portion of the decision cited by the City, (AOB at 52), the court held that retirement boards have discretion to collect arrears contributions (for example, when employees are retroactively reclassified into positions entitling them to greater pension benefits) [110 Cal.App.4th at 469-70], and declined to mandate the boards' exercise of discretion on funding the retroactive application of *Ventura County. (Id.* at 471). *Cal. Sch. Employees Ass'n. v. Sequoia Union High Sch. Dist.* (1969) 272 Cal.App.2d 98, 103-104, held that a union has standing in its own name to challenge the displacement of its food service members by vending machines because the union had an organizational interest in the school district's action. *Id.* at 105.

the *Teamsters* case, the court looked to the standing factors for associations as *plaintiffs* set out by the U.S. Supreme Court in *Warth v. Seldin* (1975) 422 U.S. 490:

> . . . an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (citation omitted.) *Teamsters v. Unemployment Ins. Appeals Bd., supra*, 190 Cal.App.3d at 1523.

The *Warth* court recognized that these standards are specific to associations as *plaintiffs*.

> [W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind. *Warth v. Seldin, supra,* 422 U.S. at 515.

In no case cited by the City was the union forced to be a stand-in *defendant* for individual union members and non-members who were absent, but necessary, party defendants in their own right. The City cites no case which supports this outcome.

b. Representational Standing Is Not the Equivalent of Class Action Representation

Even when a union has representational standing to enforce a collective bargaining agreement or the statutory rights of bargaining unit

employees, representational standing is *not* the full *equivalent* of class action representation as the City erroneously asserts, citing *Glendale City Employees' Assn. v. City of Glendale* (1975) 15 Cal.3d 328. (AOB at 46.)

In *Glendale*, a union sought a writ of mandate on behalf of a class of city employees to compel the city to calculate wages according to its memorandum of understanding. For the first time on appeal, the city argued that the plaintiff association had not provided adequate notice to class members. The Supreme Court held that, because the union as the bargaining representative of the employees could sue in its own name to enforce its MOU, the class allegations were superfluous. *Id.* at 341.

The result in *Glendale* affirmed the undisputed principle that a union has standing to sue as the representative of its members. *Glendale* does not authorize the City's attempt here to turn its action for invalidating pension benefits into a *de facto* defendants' class action against individual union members and non-members, as well as others who are either not in the collective bargaining units they otherwise represent or are not represented by any union.

8. The Trial Court Did Not Abuse Its Discretion In Finding On A *Hypothetical* Basis That the Necessary Parties Were Indispensable Under Section 389(b)

The trial court did not reach the section 389(b) "balancing" analysis until ruling on Intervenors' demurrer to the City's 6ACC naming multiple *new* cross-defendants whom the trial court had ordered joined as necessary parties following phase one of the trial. Once the trial court found that the

City's original cross-complaint filed on July 8, 2005, was barred by the one-year statute of limitations, the joinder issues became irrelevant.

Nevertheless, the trial court continued with an analysis under section 389(b) strictly on a hypothetical basis in order to give the City's claims the benefit of every doubt prior to entering its order sustaining the demurrer. (13 CT 3432:15-3433:27.) Accordingly, the trial court asked this question hypothetically: what would be the result in ruling on Intervenors' demurrer to the City's 6ACC *if* the trial court found that the City's original cross-complaint filed on July 8, 2005, *had been timely*? The answer, as detailed above, was that the City's claims in the 6ACC did *not* relate back to July 8, 2005, because neither the procedural nor the substantive rules related to a proper "Doe" amendment were satisfied. (13 CT 3433:1-3434:23.)

Thus, the trial court reached the issue under section 389(b): should the action proceed in their absence? But this question nevertheless remained a hypothetical one. Citing this Court's decision in *Save Our Bay, Inc. v. San Diego Unified Port District* (1996) 42 Cal.App.4th 686, the trial court concluded that the absent persons are indispensable and that the City's claims against SDCERS could not proceed in their absence even if this meant the "harsh result of dismissal." (13 CT 3433:13-27.) Yet, this finding on the hypothetical question altered nothing as the City's claims against SDCERS were time-barred in any event.

The City *never* addresses this inconvenient truth. Its claims against SDCERS, filed on July 8, 2005, would be *untimely*, and the case over, even

if the trial court had *not* ordered the joinder of necessary parties and, thereafter, found them to be indispensable within the meaning of Code of Civil Procedure section 389(b).

Instead, the City argues that the trial court abused its discretion in finding that the absent parties were "indispensable" under Code of Civil Procedure section 389(b), even if they were "necessary" parties within the meaning of section 389(a), because (1) traditional rules of party joinder do not apply in cases of public interest; (2) all interested beneficiaries need not be made parties "just as all taxpayers need not be before the court;" (3) equity requires that the case proceed; and, (4) the determination that joinder was practicable was itself the product of erroneous rulings related to the *Corbett* and *Gleason* Judgments and the effect of the City's sworn discovery responses.[42] (AOB at 54-57.)

None of these irrelevant arguments has merit in any event.

People ex rel. Lungren v. Community Redevelopment Agency (1997) 56 Cal.App.4th 868, does not stand for the proposition urged by the City that joinder rules do not apply in public interest cases. (*See* AOB at 42-43.)

To the contrary, the Court in *Lungren* held that an Indian tribe, which was not sued in a challenge to an agreement between the redevelopment agency and the tribe because of its sovereign immunity, had an interest in the subject of the action such that it was "a 'necessary' party

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[42] The correctness of these rulings is discussed, *supra*, at 58, 68 and 96, fn. 51.

under subdivision (a) of section 389." (*Id.* at 879.) However, because the tribe could not be joined, and could *never* be joined, dismissing the action would "immunize any local entity from court review of transfers of publicly owned real property to Indian tribes," and place the property permanently beyond the state's police powers. This result, the *Lungren* court said, was sufficiently important to constitute an exception to the general rule requiring joinder. (*Id.* at 881-83.)

Here, the trial court found (after phase one of the trial), that SDCERS participants and beneficiaries *could* be joined because they are known and subject to service of process. *Lungren* simply does not support the City's argument here that the asserted public interest in litigating the City's claims vitiates section 389 entirely.

Moreover, the general, unspecified interest (*if any*) that a taxpayer might have in the City's pension benefit legislation is *not* the same as the particular interest that an individual retiree, beneficiary, or employee has in the promised monthly pension allowance he or she is receiving or will receive in exchange for services rendered and contributions deducted from his/her bi-weekly wages.

Finally, the City's invocation of a declaration signed by the City's Mayor on June 12, 2006, and *directed to the trial court when the City's Motion for Summary Judgment was pending,* does not establish an "equitable" basis to jettison well-established joinder rules, as the City urges. (AOB at 55.) Nor did the Mayor suggest otherwise. He simply urged a

resolution of the City's pending motion notwithstanding the controversy over the City Attorney's authorization to have filed the pension take-away claims in the first place:

> . . . the City needs and desires from this Court a determination as to the legality of the benefit increases under MP 1 and MP 2 . . . at the June 23, 2006 hearing on the City's Motion for Summary Judgment. . . . I therefore respectfully ask this Court to entertain the City's Motion and resolve the issues raised therein. (City's Augmentation to CT 2.)

The City has failed to sustain its burden to show that the trial court abused its discretion in interpreting and applying Code of Civil Procedure section 389(b) to the facts and circumstances of this case.

E. The City Has Been Denied Relief On Its Debt Limit Law Theory Without Reaching The Merits Because The City Sued The Wrong Party

1. Standard of Review

The trial court's determination that Cross-Defendant SDCERS is not an entity capable of violating debt limit laws is reviewed de novo because it involves the application of a Constitutional or Charter provision to undisputed facts and thus presents a question of law.

The trial court's determination that, if SDCERS is deemed to be "the City of San Diego" in order to bring it under these Constitutional and Charter provisions, there is no justiciable controversy because the City is suing itself, is also reviewed de novo.

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2. The City's Second Theory for Invalidating Its Own Pension Benefit Legislation Failed for Lack of a Justiciable Controversy

Having correctly determined that the City's claims are barred by (1) the statute of limitations, (2) the *Corbett* Judgment, and (3) the *Gleason* Judgment, the trial court also concluded that the City's attempt to state a debt limit claim against sole cross-defendant SDCERS failed for lack of a justiciable controversy.

The *only issue* related to the City's debt limit law theory addressed during Phase One was "whether the City can pursue a claim that *SDCERS* violated the debt limit laws." (12 CT 3114.) The merits of the claim never became ripe for determination because the trial court concluded that the City had failed to raise a justiciable controversy regarding it. "The Court must rule based on the allegations in the 5ACC and the parties before the Court." (12 CT 3142:24-25.)

3. The Debt Limit Laws At Issue Apply to Specific Public Entities and SDCERS Is *Not* One of Them

The California Constitution, Article XVI, section 18, limits the indebtedness or liability a "county, *city*, town, township, board of education, or school district" may incur without a vote of the electorate. City Charter section 99 likewise limits the indebtedness which the *City of San Diego* may incur. (Ex. 1180.40-1180.41, emphasis added.)

The trial court held that "the evidence and the City Charter and California Constitution define SDCERS' duties and responsibilities. It is

the administrative body for the pension system created by the City. (Exh. 1103.) SDCERS' responsibility is to administer the system and pay the benefits the City sets. It invests the pension assets and provides annual accountings. It has no power to set or rescind benefits as this power rests exclusively with the City. (Exh. 1101 and 1102.)" (12 CT 3140:17-3141:1; 4 CT 950, ¶¶ 24-26.)

Because SDCERS is a "public retirement system," as the City alleges in its 5ACC, and is *not* a county, city, town, township, board of education, or school district as defined by the Constitution, Article XVI, section 18, and because it is *not* the City of San Diego for purposes of applying City Charter section 99 (Ex. 1103.3-1103.4, Art, IX, § 141), these debt liability sections do not apply to SDCERS. (12 CT 3141:2-10; 4 CT 946, ¶ 3.)

The City does *not* challenge these findings. Instead, the City argues that SDCERS is nevertheless chargeable with a violation of the debt limit laws because it *enabled the City* to violate the debt limit laws by approving the City's funding proposals, and because it is *causing the City* to continue to violate the debt limit laws by demanding contributions to pay the benefits the City created.

The trial court rejected this notion because (1) *allowing* "under funding" is not the equivalent of *creating* debt; (2) if the MP 1 and MP 2 pension benefit legislation violated the debt limit laws, it was the *City's* violation; (3) the parties to the contracts which allegedly created debt in

excess of Constitutional and Charter limits were either not named as cross-defendants on the City's claims or not before the court at all; and (4) the only potential remedy that might be directed to SDCERS would relate to the contribution agreements which had already been terminated by the *Gleason* Judgment. (12 CT 3141:14-17; 3141:27-3142:18.)

4. If SDCERS Were Deemed To Be "The City" Under the Debt Limit Laws, the Result Would Be That the City Is Suing Itself

The trial court also concluded that, if the court were to construe the provisions of the State Constitution to reach SDCERS *because it is part of the City of San Diego*, then the City would be suing itself for relief. As such, this would not constitute "an appropriate justiciable controversy under the unique facts and circumstances of this case. . . . since the real parties are not before the Court or subject to the allegations in the causes of action." (12 CT 3141:9-13; 3142:19-25.)

Moreover, the trial court correctly concluded that SDCERS did not stand in the shoes of the employees or serve as a substitute for them. Thus, the trial court observed, the cases cited by the City were distinguishable because they involved the actual parties who had contracted with the public entity and obtained a benefit subject to being abrogated due to a violation of debt limit laws. (12 CT 3142:10-15.)

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5. The City's Arguments Related to Justiciability and the Nature of Declaratory Relief Actions Are Not Supported by Case Law or Logic

The City argues that the trial court's decision related to its debt limit claims involved the "starkest legal error in its decision" because the trial court "completely misread" the debt limit laws, "completely misapprehends" what these laws prohibit, "failed to appreciate the nature of a declaratory relief action," and has an "erroneous understanding of justiciability doctrines." (AOB at 33-38.) On the latter point, the City asserts that, as long as there are at least two parties in its declaratory relief action who *disagree* over whether the debt limit laws have been violated, it is irrelevant *who* violated the debt limit laws and it is "immaterial whether SDCERS, or some other entity, is the wrongdoer." (AOB at 37-38.)

Declaratory relief is an equitable remedy available to an interested party in a case "of actual controversy relating to the *legal rights and duties of the respective parties.*" (*East Bay Mun. Utility Dist. v. Dep't of Forestry & Fire Protection* (196) 43 Cal.App.4th 1113, 1121.) An action not founded upon an actual controversy *between the parties to it*, but which is brought for the purpose of securing a determination of a point of law for the gratification or the curiosity of the litigants, or the sole object of which is to *settle the rights of third persons who are not parties*, is collusive and will not be entertained. (*City and County of San Francisco v. Boyd* (1943) 22 Cal.2d 685, 694, emphasis added.) "When persons who are most likely to challenge a request for declaratory relief are not before the court, any

opinion rendered is advisory and not within the court's function or jurisdiction." (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 860.)

Here, because the City would be suing itself for an alleged violation of debt limit laws, there was no actual controversy between the City and SDCERS relating to their respective rights and duties under these laws even *before* SDCERS and the City *stipulated* that SDCERS would no longer oppose the City's claims. (11 CT 2852.)

Unflappable, the City argues, not only that justiciability requirements were satisfied *after* SDCERS became a cross-defendant *in name only*, but also that its settlement stipulation with SDCERS was itself *proof* of a justiciable controversy: "SDCERS has stipulated that it will be bound by the judgment of the court in this case. Accordingly, there is a justiciable controversy between the City and SDCERS as to whether the debt limit laws have been violated." (AOB at 40.) It is nonsensical to argue that settling with a party with whom there was no jusiticable controversy in the first place somehow becomes "proof" of justiciability.

Finally, the City continues to insist that the Unions' mere presence in this consolidated case as Intervenors was sufficient to satisfy justiciability requirements, though they were not named as cross-defendants, and the real parties in interest whose legal rights were at stake were never made parties at all. Again, the City's factual and legal analysis related to justiciability requirements is wrong.

6. The City's Argument That There *Is* A Justiciable Controversy When It Sues Itself Fares No Better

The City asserts that the debt limit laws *do* apply to SDCERS because it is a *department* of the City and, therefore, it *is the City*. The fact that the City would be suing itself is no obstacle to justiciability, the City argues because the City must bring this action against SDCERS "to stop Board distribution of unlawfully-created benefits." (See AOB at 39.) This argument simply returns full circle to the rulings discussed above whereby the City's claims to have the MP 1 and MP 2 pension benefits declared void have failed. Moreover, in its settlement stipulation with SDCERS, the City dismissed its writ of mandate action against SDCERS; thus, no claim remained in the City's 5ACC designed to "stop" SDCERS from distributing allegedly unlawful pension benefits. (11 CT 2852-2853.)

Next the City argues generally that one agency of a public entity may sue another agency and, thus, "SDCERS is subject to suit by the City." (See AOB at 40.) The trial court did not conclude that a justiciable controversy could *never* arise between the City and SDCERS; the trial court simply held that the City's claims against SDCERS for allegedly violating debt limit laws is not such a controversy for the reasons described above.

City Council v. McKinley (1978) 80 Cal.App.3d 204, on which the City relies, does not hold otherwise. In *McKinley*, the City Council sought a writ of mandate directing the City Manager and City Auditor to perform their ministerial duties in executing a contract the City Council had

authorized. An actual and justiciable controversy existed between them because the City Manager and City Auditor contended that the City Council had violated conflict of interest laws when authorizing the contract such as to justify their refusal to execute it. That is not this case.

Here, the City, having exercised its exclusive legislative power in enacting pension legislation, is suing itself seeking to invalidate the pension benefits it created, using SDCERS as a mere "straw man" in the process. The trial court's determination that the City's debt limit claim against SDCERS failed for lack of a justiciable controversy is unassailably correct.

VII.

CONCLUSION

In search of a pension bail-out, the City asks this Court to ignore statutes of limitation and undermine the finality and enforceability of judgments in order to rescue its ill-fated claims. The City mislabels its cause as the pursuit of "good government." The short answer to the City's quest is this: good governments, like good people, keep their promises, and a good judicial system applies the law equally to all litigants.

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Respondents urge this Court to uphold the trial court's entry of judgment dismissing the City's claims. In so doing, justice will be done.

DATED: June 11, 2008

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.204(c)

I certify that the text of this brief, including footnotes but excluding the Tables and this Certificate, has a typeface of 13 points and, based upon the word count feature contained in the word processing program used to produce this brief (WordPerfect 11), contains 27,549 words.

Dated: June 11, 2008

ANN M. SMITH

Re: *The City of San Diego v. San Diego City Employee's Retirement System, et al.*
Court of Appeal Case No. D051805
SDSC Case No. GIC841845

PROOF OF SERVICE

I, the undersigned, hereby declare and state:

I am over the age of eighteen years, employed in the city of San Diego, California, and not a party to the within action. My business address is 401 West A Street, Suite 320, San Diego, California.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 12, 2008, San Diego, California.

_____
ELIZABETH DIAZ